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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALLEN LUEBBERS,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the
	*	United States District
Michael S. Bowersox,	*	Court for the Western
Superintendent,	*	District of Missouri
	*	
Appellee.	*	

Submitted: December 13, 1999
Resubmitted on Supplemental Briefs: February 10, 2000
Filed: March 14, 2000

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Leamon White appeals the denial of his petition for a

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[1] The Hon. Michael J. Melloy, United States District Judge for the Northern District of Iowa, sitting by designation.

writ of habeas corpus. The District Court held that all of Mr. White's claims were procedurally barred, except those adequately raised by his first amended post-conviction motion in the state courts. We reverse and remand for further proceedings on the merits of those claims the District Court held to be procedurally barred. We hold that the state procedural rule that barred Mr. White's second amended motion was inadequate to bar federal consideration of these claims. We affirm the remaining portion of the District Court's judgment. We agree with that Court that the claims it found open on federal habeas are without merit.

I.

Mr. White was tried and convicted of first degree murder. He was sentenced to death. Mr. White appealed to the Missouri Supreme Court, which ultimately affirmed his conviction. While Mr. White's direct appeal was proceeding, he filed a pro se motion in the Circuit Court of Jackson County, Missouri, for post-conviction relief. Mr. White's post-conviction motion became entangled in procedural difficulties because his court-appointed attorneys failed to file a timely amended motion on his behalf. Under Missouri law, this failure constituted "abandonment," and Mr. White was owed some remedy for his attorneys' failures. As a remedy, the Missouri courts treated as timely the first, but not the second, of two untimely motions filed by Mr. White's attorneys. They limited the remedy to the first motion on the ground that Mr. White had improperly signed a "blank verification." The predominant issue on appeal is whether the procedural rule barring the second motion was an adequate state ground. This issue is practically determinative of Mr. White's habeas petition because almost all of the claims raised in the first motion, which was hastily drafted, were procedurally defaulted due to inadequate fact pleading.

On August 17, 1989, Mr. White filed his pro se motion for post-conviction relief in the Circuit Court pursuant to Mo. R. Crim. P. 29.15. On September 25, 1989, the Court appointed the Missouri Public Defender's Office to represent Mr. White in post-conviction proceedings. Under the Rule, counsel has a duty to file an amended motion if, after consulting with the movant, there appear to be grounds for doing so. Just five days before the amended motion was due, the Missouri Public Defender's Office assigned an attorney, Larry Pace, to represent Mr. White.

On October 20, 1989, Mr. Pace entered his appearance. He moved for and was granted an extension, until November 23, 1989, to file an amended motion. Under Rule 29.15, this was the only extension allowed. On November 9, 1989, fourteen days before the amended motion had to be filed, Mr. Pace improperly withdrew from the case without permission of the Court. It is now undisputed that this constituted abandonment under Missouri law. The Public Defender's Office replaced him with a second attorney, Joe Locascio. At that time, Mr. Pace had not yet begun to write an amended motion, had not secured the files of Mr. White's trial attorneys, and had not met with Mr. White.

Five days later and nine days before the final deadline, Mr. Locascio met with Mr. White to discuss his post-conviction motion. This was Mr. White's first meeting with any attorney to discuss his post-conviction motion. While at the prison, Mr. Locascio had Mr. White sign a "blank" verification, to be added to the amended motion once it was written.[2] Mr. Locascio did

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[2]Mo. R. Crim. P. 29.15 provides: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed

this because Rule 29.15 motions are void unless verified by the movant. With time so short, he felt there would be no opportunity to obtain the verification properly after the motion was written.

Despite this short-cut with the verification, Mr. Locascio missed the November 23, 1989, deadline for filing Mr. White's amended motion. As the Supreme Court of Missouri later held, this constituted a second instance of abandonment under Missouri law. On November 27, 1989, Mr. Locascio filed the amended motion, four days late, and a separate motion for a thirty-day extension to file a second amended motion. Although the Circuit Court lacked the jurisdiction to do so, it granted leave to file a second motion and an extension until January 9, 1990. Mr. Locascio filed a second amended motion on January 8, 1990. Because the Court lacked jurisdiction to grant the extension, this motion was later ruled untimely. On August 1, 1990, the Circuit Court denied relief on all of Mr. White's post-conviction motions.

On appeal, the Missouri Supreme Court reversed and remanded for a determination of whether Mr. White's first and second attorneys had abandoned him. White v. State, 813 S.W.2d 862 (Mo. 1991) (en banc) ("White I"). Under Rule 29.15, it was the duty of appointed counsel to determine whether sufficient facts were asserted in the pro se motion to support the claims that it raised; to determine whether the movant had included in the pro se motion all claims for post-conviction relief known to the movant; and to correct any deficiencies in the pro se motion by filing an amended motion. Although there was no right to effective assistance of post-conviction counsel, Missouri provided a remedy, as a matter of state law, where appointed counsel "abandoned" his client by

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in the motion."

completely failing to perform these statutory duties. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc). The Missouri Supreme Court, therefore, remanded for determination of whether Mr. White's first and second attorneys had abandoned him by withdrawing without leave of court, by failing to file a timely amended motion, and by failing to obtain a proper verification of the amended motion. On remand, the Circuit Court found no abandonment, but it was again reversed on appeal to the Missouri Supreme Court.

The Missouri Supreme Court found abandonment but provided only a limited remedy because Mr. White had signed the "blank" verification. White v. State, 873 S.W.2d 590 (Mo. 1994) (en banc) ("White II"). The Missouri Supreme Court held that Mr. White had been abandoned when his first attorney withdrew without court permission. This constituted abandonment because Mr. White's "second counsel did not have enough time to file a timely amended motion after he entered his appearance." Id. at 597. Additionally, the Court found that Mr. White had been abandoned when his second attorney failed to file a timely amended motion.[3] The Court found that "no action or inaction by [Mr. White] contributed to the delayed filing." Ibid.

As a remedy, the Missouri Supreme Court forgave the untimely filing of the first amended motion. The Court, however, refused to apply this remedy to the second amended motion. The Court reasoned, first, that Mr. White had been abandoned only with respect to the timing of the first amended motion, not with respect to its content. Second, the Court

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[3]The Missouri Supreme Court also requested an investigation by Missouri's Chief Disciplinary Counsel to determine whether any ethical rules had been broken by the Public Defender's Office or the two attorneys.

considered that Mr. White had waived any claim that the first amended motion was incomplete when he signed the "blank" verification: "By signing the verification in blank, defendant knew or should have known that he was an active participant in falsely verifying a document that had not yet been written." Id. at 595.

The Missouri Supreme Court remanded to the Circuit Court for consideration only of those claims made in Mr. White's first amended motion. The Circuit Court denied all of Mr. White's claims. On appeal, the Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo. 1997) (en banc) ("White III"). The Missouri Supreme Court addressed only six of Mr. White's twenty-eight claims on the merits. The Court held that the rest of Mr. White's claims were procedurally defaulted due to the inadequate pleading of the first amended motion. Specifically, the Court found that in twenty-two of his claims, Mr. White had failed to plead sufficient facts to warrant relief.[4]

On December 26, 1997, Mr. White filed his petition for a writ of habeas corpus in the District Court. The Court held that the Missouri Supreme Court's rejection of the second amended motion was based on an independent and adequate state ground. Likewise, the Court held that Missouri's fact-pleading requirement was an independent and adequate state ground. Accordingly, the District Court found that all of Mr.

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[4]Our holding that consideration of the second amended petition was not barred by an adequate state procedural ground makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition. We likewise need not consider petitioner's assertion that his actual innocence excuses any procedural default.

White's claims were procedurally barred, except those six claims that the Missouri Supreme Court had found adequately raised in the first amended motion. On these six claims, the District Court ruled against Mr. White on the merits. Three of these claims have been appealed, along with the District Court's ruling on procedural bar.

II.

Federal review of a habeas petition is barred when a state court dismisses or rejects a prisoner's claims on independent and adequate state grounds unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Procedural default on a claim under state law may constitute an independent and adequate state ground, Harris v. Reed, 489 U.S. 255, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. Ford v. Georgia, 498 U.S. 411, 423-4 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." Easter v. Endell, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). We believe that Mr. White was denied a fair opportunity to seek relief in this case because the procedural rule that barred his second amended petition was neither firmly established nor readily ascertainable.

The procedural default in this case was based on two limitations of Missouri's remedy for abandonment newly introduced in Mr. White's own case. First, the Missouri

Supreme Court held that Mr. White's second amended motion was not entitled to consideration because he had been abandoned only as to the timing of his first amended motion, but not as to its content. At the time of Mr. White's case, the Missouri Supreme Court had just recently decided that there should be a remedy for attorney abandonment in post-conviction proceedings. The Court had stated a general rule that relief was appropriate where the attorney, and not the movant, was responsible for the untimeliness or improper verification of the motion. Mr. White's case, White II, was the first in which the distinction between timing and content was announced and employed to limit the remedy available to an abandoned defendant.

Even in retrospect, the basis for this distinction is unclear to us. The Missouri Supreme Court found that Mr. White's first attorney had abandoned him by leaving his second attorney without time to file a timely motion. We cannot see why such an abandonment, forcing Mr. White's second attorney to prepare and write a motion in fourteen days, would not include the content of the motion. Mr. White's attorney lacked the time to write a motion because he lacked the time to write its content. With no concern for content, one day would have been sufficient. As confusing as this distinction is in retrospect, we have no trouble finding that neither Mr. White nor his attorneys could reasonably have anticipated any such rule in advance of its first application in Mr. White's own case.

Before White II, the Missouri Supreme Court had held that where abandonment occurred new counsel would be appointed and an extension provided as necessary to file an amended motion. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc); Bradey v. State, 811 S.W.2d 379 (Mo. 1991) (en banc). In White II, the Missouri Supreme Court stated a new rule limiting the remedy for abandonment. The State of

Missouri argues vigorously that this limit was implicit in, and correctly derived from, Missouri's prior precedents. The State's argument, however, is not determinative of the issue before us. Even though a rule appears in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence. Ford v. Georgia, 498 U.S. at 423. The limitation on extensions announced in Mr. White's case is dependent upon the distinction, discussed above, between abandonment as to timeliness and abandonment as to content. For the reasons already discussed, we cannot say that Mr. White was fairly apprised of its existence. Accordingly, even if, as Missouri argues, this rule forms a consistent pattern with prior precedents, we could not apply it as a procedural default in this case.

As a second ground for limiting Mr. White's abandonment remedy, the Missouri Supreme Court held that Mr. White had waived any claim that he had been abandoned as to the content of the motions when he signed the "blank" verification. This waiver principle was, again, first announced in Mr. White's own case, White II. The Court based this principle on the fact that Mr. White knew or should have known he was an active participant in falsely verifying a document that had not yet been written. The Missouri Supreme Court was flee to interpret its procedural rules in this way. Nevertheless, we do not see how, before the decision in Mr. White's own case, anyone could have known that signing this sort of open-ended verification constituted a waiver of remedies for abandonment.

To begin with, before White II, there was no Missouri precedent relating to the signing of "blank" verifications. Moreover, in White I, the Missouri Supreme Court itself suggested that the blame for the "blank" verification might fall on the second attorney who asked Mr. White to sign it; the

Court remanded Mr. White's case to the Circuit Court for a determination of whether the attorney's actions in procuring the improper verification constituted abandonment. In the absence of any precedent, we do not see how Mr. White could have known the legal significance of the improper verification before the Missouri Supreme Court did. In sum, this principle was also neither readily ascertainable nor firmly established at the time of Mr. White's case.

Given the state of the law at the time, Mr. White did not have a fair opportunity to seek relief in this case. Mr. White was presented with a very difficult decision when his attorneys abandoned him: to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would be at least timely. The new principles announced by the Missouri Supreme Court in his case were not available to guide him in making that decision. Because these principles were neither readily ascertainable nor firmly established, the procedural default that ensued cannot be considered an adequate state ground to bar federal review.

III.

Mr. White also appeals the District Court's denial of three claims that the District Court found were not procedurally defaulted. First, Mr. White argues that he received ineffective assistance of counsel on his direct appeal. At Mr. White's trial, the Court sustained the prosecutor's motion to strike for cause a venireman, Mr. Layson, over Mr. White's lawyers' objection. The Court had found that Mr. Layson had admitted his bias against the prosecutor; that he was a "loose cannon," likely to share extrajudicial knowledge with other jurors; and that he was a danger to both prosecutor and defendant. Mr. White's attorney failed to argue on direct appeal that Mr. Layson had been improperly removed. Mr. White contends that the trial judge's decision was groundless because Mr. Layson showed no

indication of bias. Mr. White concludes, therefore, that failure to raise this "sure" argument on appeal constituted ineffective assistance of counsel.

Largely for the reasons given by the District Court, we reject this argument. Absent contrary evidence, we must assume that Mr. White's appellate counsel failed to raise this claim for reasons of strategy. Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998). There is no contrary evidence in this case. We cannot accept Mr. White's argument that Mr. Layson showed no indication of bias and that this would be a successful claim on appeal. According to the record, Mr. Layson indicated that he believed the prosecutor was lying because he failed to mention the possibility of conviction on a lesser offense. Mr. Layson then engaged in an involved disagreement with the trial judge and the prosecutor about the nature of the penalty phase of the trial. Under Missouri law, the trial court has "broad discretion to determine the qualifications of prospective jurors." State v. Parker, 886 S.W.2d 908, 919 (Mo. 1994) (en banc). There were no clear grounds in the record for challenging the trial court's discretionary determination that Mr. Layson was biased and a "loose cannon," dangerous to both the prosecutor and Mr. White. Mr. Layson's own words support that conclusion.

Second, Mr. White argues that he received ineffective assistance of trial counsel because of his attorneys' conflict of interest. At various points during the trial, Mr. White's attorneys asked him, before the court, to endorse or acknowledge certain decisions made with respect to his defense. Mr. White argues that his attorneys were motivated by a desire to protect themselves from ineffective-assistance-of-counsel claims, and that their questions revealed confidential and damaging trial strategies to the court and the prosecutor. Like the District Court, we cannot accept Mr. White's argument. Mr. White relies on Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir.

1991). Unlike Blanco, however, where attorneys conceded to the court during the sentencing phase that there was no mitigating evidence for their client, Mr. White can assert no prejudice here. It is true that Mr. White was asked questions to make sure that he understood his rights and that he acquiesced in certain strategic decisions. In doing so, however, no damaging admissions or revelations were communicated to the Court or the prosecutor. Asking such questions was not improper, but even if it had been, no relief would be appropriate, because no prejudice to Mr. White resulted.

Third, Mr. White argues that judicial bias deprived him of due process. Specifically, Mr. White maintains that the Missouri Circuit Court in considering his claims of abandonment had an ex parte communication with the prosecutor about the proper scope of an evidentiary hearing. Mr. White also claims that the Court adopted verbatim the prosecutor's proposed findings of fact and conclusions of law after this hearing. Even assuming that the Court did something improper, Mr. White cannot show any prejudice from this episode. The Missouri Supreme Court completely vacated the Circuit Court's decision on appeal and found abandonment. Any prejudice to Mr. White that might have occurred either from the conversation or by the verbatim adoption of findings was eliminated by the decision of the Missouri Supreme Court. Again, we affirm the decision of the District Court.

Accordingly, we reverse in part, affirm in part, and remand to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the
	*	United States District
Michael S. Bowersox,	*	Court for the Western
Superintendent,	*	District of Missouri
	*	
Appellee.	*	

Filed: December 23, 1999

Before RiCHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[1] District Judge.

ORDER

The motion of appellant, Leamon White, to expand the

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[1]The Hon. Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

certificate of appealability is granted, and the following additional issues are certified for inclusion in the certificate:

> 1. Whether appellant's abandonment by the public. defender's office and his two appointed post-conviction lawyers during the Rule 29.15 proceeding constituted an excuse for procedural default under Missouri law.
>
> 2. Whether the Missouri Supreme Court's remedy for this abandonment was not based on an adequate and independent state ground, and violated due process.
>
> 3. Whether the action of the public defender's office in removing one attorney who had been appointed to represent Mr. White, and substituting another attorney 14 days before Mr. White's post-conviction motion was due, was an external cause of his default, and thus allows Mr. White to bring his federal constitutional claims in federal court.
>
> 4. Whether post-conviction counsel, once having abandoned Mr. White, were no longer his agents, so that their errors cannot be attributed to him, and therefore became external causes of his default.

The parties are also requested to address one other issue. As we understand the case, appellant makes two basic arguments for avoidance of a procedural bar: inadequate state ground and actual innocence. If the Court decides that either one of these arguments is well taken, is there any reason why it would need to address the other one? Are there any issues the

merits of which would be opened up, so to speak, by holding in favor of appellant on the question of actual innocence, but not by a holding in favor of appellant on the issue of adequate state ground?

The appellee is allowed additional time to brief these issues. He will be given to and including January 21, 2000, for this purpose. The brief shall not exceed 25 pages. Thereafter, appellant may file an answering brief on the same subjects, this brief to be filed on or before February 4, 2000, and not to exceed 25 pages.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 97-1663-CV-W-3
	)	
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTION FOR WRIT OF HABEAS CORPUS

Pending is Petitioner's first application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, the application is denied.

I. BACKGROUND

A. The Crime

The facts of the crime (which occurred in January 1987) were summarized by the Missouri Supreme Court as follows:

> Defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.
>
> The purpose of defendant's visit was to

> obtain some "crack" cocaine. Wright had previously promised to get the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.
>
> According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

State v. White, 813 S.W.2d 862, 863-64 (Mo. 1991) (en banc), cert. denied, 502 U.S. 1103 (1992) ("White I"). Further details about the evidence and testimony at trial will be discussed as

necessary.

B. Procedural History in State Court

Resolution of many of Petitioner's arguments depends upon an understanding of a convoluted series of events that followed Petitioner's conviction.

> After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Id. at 864. At the time, postconviction motions were governed by Rule 29.15,[1] which declared in part that "[a]ny amended

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[1]Missouri Rule of Criminal Procedure 29.15, was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of post-conviction relief." Lowe-Bey v. Groose, 28 F.3d

motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days . . . ." See id. (quoting Rule 29.15(f)). The court noted its prior holdings that for purposes of this rule the date counsel is appointed is the date on which the trial court designates the public defender to represent the petitioner, not the day counsel actually enters his or her appearance. Counsel was appointed, and the thirty day period for filing amended motions began to run, on September 25, 1989. When First Appointed Counsel obtained a thirty day extension (to November 23, 1989) to file an amended petition, he withdrew from the case. A second attorney simultaneously entered his appearance, but did not file an amended motion until November 27, 1989 - four days after the time for filing an amended motion expired. Without addressing the effect of the Second Amended Motion filed on January 8, 1990, White I remanded the case (insofar as it related to postconviction issues) for a determination as to whether the First Appointed Counsel's withdrawal without leave of court constituted abandonment under state law. Id. at 864. The court went on to consider (and reject) those issues raised on direct appeal. Id. at 865-868.

On remand, the trial court dismissed the 29.15 motion because it was not properly verified[2] and alternatively reinstated

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816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). Despite the consolidation, the direct appeal and the appeal from the postconviction proceedings retain their independent identities. See Part IV.M, infra.

[2]The verification issue is not relevant to these proceedings and, in the interests of brevity and clarity, will not

its prior findings of fact and conclusions of law. It also held that Petitioner had not been abandoned by any of his postconviction counsel (because counsel could not abandon a matter that was not properly before the court, held to be true in this case because of the improper verification). On appeal, the Missouri Supreme Court concluded that the verification was sufficient. State v. White, 873 S.W.2d 590, 594 (Mo. 1994) (en banc) ("White II"). However, the court also observed that because Rule 29.15 contemplated only one extension of time, the second extension of time was invalid and the only valid extension was the one granting Petitioner until November 23, 1989 to file his amended petition. The court determined this was an unalterable requirement of Rule 29.15, holding that it would "still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion." Id.

Having held the state trial court had jurisdiction over Petitioner's pro se 29.15 motion, the next significant issue (for purposes of the present case) was whether the court had jurisdiction over the first or second amended motions. Both motions were untimely - the first because it was filed after the extended deadline of November 23, 1989, and the second because it was filed pursuant to an impermissible second extension of time. Id. at 595-96. The court "conclude[d] that the untimely filing of defendant's [first] amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel." Id. at 597. The court went on to conclude that Petitioner was abandoned by his First Appointed Counsel, but only insofar as to the *timing* of its filing, not its content. The court observed "that there is no constitutional right to post-conviction counsel and that failure

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be detailed here.

of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant." Id. at 598. To fashion a remedy for the abandonment which would cure the damage caused by the improper timing, the court reinstated the First Amended Motion. It declined to reinstate the Second Amended Petition because, even absent the abandonment by the first appointed counsel, Petitioner never had a right to file a Second Amended Petition. Id. at 599. ("To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive under Rule 29.15."). The case was remanded to the trial court for consideration of the issues contained in the First Amended Motion.

On remand, the trial court denied Petitioner's claims without holding an evidentiary hearing. The Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo.) (en banc), cert. denied, 118 S. Ct. 365 (1997) ("White III.)" The court noted Rule 29.15's requirement that a petition state facts that demonstrate entitlement to relief. It also referred to a previously-established pleading rule applicable in postconviction proceedings:

> [N]o evidentiary hearing will be required unless the motion meets three requirements: '(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant.' State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance

did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced.

Id. at 893. The court then considered Petitioner's remaining arguments, rejecting those that required a hearing out of hand based on Petitioner's failure to plead facts. It also addressed - and rejected - the few arguments that were addressed on the merits based on the records before the trial court. Ultimately, the trial court's decision was affirmed in its entirety.

II. PROCEDURAL DEFAULT

"Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of... procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims." Sawyer v. Whitley, 505 U.S. 333, 337-39 (1992) (citations and emphasis omitted). To avoid a procedural default, the habeas petitioner must fairly present his claim to the state court, that is, he must present the same facts and legal theories to the state court that he later presents to the federal courts. Morris v. Norris, 83 F.3d 268, 270 (8th Cir. 1996). In addition, as the quote from Sawyer suggests, it is not enough for Petitioner to simply raise the arguments; they must be raised in a manner that complies with state law. Failure to do so constitutes a procedural default. Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997), cert. denied, 118 S. Ct. 1197 (1998). Here, Petitioner's failure to follow state-law pleading requirements for securing a hearing operates as a procedural bar.[3] "If state procedural rules prevent the petitioner from obtaining such a hearing, then the petitioner is' also procedurally barred from obtaining habeas relief in a

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[3]This issue is discussed in further detail in Part IV.O, infra.

federal court . . . ." McCall v. Benson, 114 F.3d 754, 757 (8th Cir. 1997); see also Turner v. Delo, 69 F.3d 895, 896-97 (8th Cir. 1995) (state court holding that petitioner "failed to provide the facts required under Missouri law to entitle him to an evidentiary hearing... constitutes a Procedural default"); Smith v. Groose, 998 F.2d 1439, 1441 (8th Cir. 1993).

Although a procedurally defaulted claim ordinarily will not be considered in a habeas proceeding, there are two circumstances in which the procedural bar can be lifted.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722,750 (1991). After reviewing the record in this case, the Court concludes the issue of procedural default predominates over the substantive claims asserted by Petitioner. Comprehension is best served by examining these attempts to lift the procedural bar before considering Petitioner's substantive arguments.

A. Actual Innocence

"To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly

deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995).

> [A] petitioner who raises a gateway claim of actual innocence must satisfy a two-part test. First, the petitioner's allegations of constitutional error must be supported with new reliable evidence that was not presented at trial. Second, the petitioner must establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The actual innocence exception requires review of procedurally barred, abusive, or successive claims only in the narrowest type of case--when a fundamental miscarriage of justice would otherwise result.

Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir, 1997) (en banc), cert. denied, 118 S. Ct. 887 (1997).

To support his gateway claim of actual innocence, Petitioner has filed a series of documents, affidavits, reports and other material referred to collectively as his Appendix of Actual Innocence (the "Appendix"). Subsequently, he filed additional affidavits and materials to supplement the Appendix. Respondent raises a threshold issue by moving to strike all of the material based on the Supreme Court's decision in Herrera v. Collins, 506 U.S. 390 (1993). In Herrera, the Supreme Court addressed the viability of a *substantive* claim of actual innocence entitling a prisoner to relief. As explained in Schlup, despite the label of "actual innocence," the concepts can serve different purposes and, hence, different analyses will apply. In Schlup, the claim of actual innocence was not offered as a ground entitling the prisoner to relief, but rather as a "gateway"

through which previously defaulted constitutional arguments could be considered. Schlup, 513 U.S. at 515-16; see also Amrine v. Bowersox, 128 F.3d 1222, 1227 (8th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 1807 (1998) ("Amrine's claim is unlike Herrera's because he does not seek relief on the basis that he is actually innocent, but rather on the basis of an unconstitutional trial. He raises actual innocence as a means to avoid a procedural bar to consideration of his constitutional claims so his gateway claim is properly considered under Schlup.").[4]

A petitioner asserting a Schlup "gateway" claim must support his allegations with reliable evidence. Schlup, 513 U.S. at 324; McCoy v. Norris, 125 F.3d 1186, 1190 (8th Cir. 1997), cert. denied, 118 S. Ct. 1195 (1998); Battle v. Delo, 64 F.3d

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[4]In arguing to strike the Appendix and subsequent affidavits, Respondent relies exclusively upon Herreraand makes absolutely no mention of Schlup - despite the obvious fact that Petitioner has presented the Appendix to support the actual innocence exception pronounced in Schlup and has carefully separated his "actual innocence as grounds for lifting the procedural bar" arguments from his "actual innocence as grounds for relief" arguments. Respondent's blindness to Schlup has made the Court's analysis of this issue very difficult. The failure to even acknowledge Schlup's existence is also curious not only because it is a significant Supreme Court opinion, and not only because it arose from the Eighth Circuit, but because it arose from this *state*.

There may come a time when Respondent expects habeas petitions to be ruled in an extremely prompt manner. See 28 U.S.C. § 2266(b)(1)(A). Respondent's expectation cannot be honored if Respondent fails to acknowledge and discuss controlling Supreme Court precedent.

347, 354 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996). There are restrictions (as discussed below) on the type of evidence that can be considered, but the only way to determine whether Petitioner's efforts satisfy these requirements is to look at the Appendix. Therefore, Respondent's Motion to Strike the Appendix (Doc. # 22) is denied. Similarly, Respondent's Motions to Strike the supplemental affidavits are denied to the extent those affidavits present information that purportedly bears on Petitioner's actual innocence. The Motions that are denied are Documents 28, 34, and 37. The Motion to Strike filed on July 8, 1998 (Doc. # 26) is denied to the extent that it seeks to strike Cleveland Ford's affidavit.[5]

To support a claim of actual innocence, the petitioner must present *evidence* not merely allegations or speculations - to prove his point. Weeks, 119 F. 3d at 1352-53. The evidence must demonstrate his factual innocence of the crime; evidence bearing on the allegedly improper application of criminal law

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[5]The remaining portion of this Motion addresses an affidavit that bears on trial counsel's performance, not on Petitioner's assertion of actual innocence. The same is true of the Motion to Strike filed on October 1, 1998 (Doc. # 40). In addition, Petitioner has attached affidavits and other materials to his Traverse, all of which purport to bear on trial counsel's ineffectiveness. These materials do not bear on Petitioner's factual innocence, and cannot be considered in this proceeding because (as will be seen in Part IV, infra). Petitioner's claims of ineffective assistance of counsel have either been procedurally defaulted or Petitioner has had a full and fair opportunity to develop the facts and this Court is constrained to abide by the state court's factual findings. Petitioner cannot offer additional evidence bearing on the ineffectiveness of his trial counsel at this juncture.

will not suffice. Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997)(en banc), cert. denied, 119 S. Ct. 78 (1998); Pitts v. Norris, 85 F.3d 348, 350-51 (8th Cir.), cert. denied, 117 S. Ct. 403 (1996). Examples of the proper type of evidence include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence . . ." Schlup, 513 U.S. at 324. In addition, "an important initial step in the analysis of a habeas petitioner's claim of actual innocence" is whether the proffered evidence is new. McCoy, 125 F.3d at 1190; see also Schlup, 513 U.S. at 324. Evidence that is merely cumulative of evidence already offered at trial will not satisfy the standard. McCoy, 125 F.3d at 1191. In addition, evidence that is known to or readily available to the criminal defendant will not satisfy the Schlup standard. E.g., Schlup, 513 U.S. at 327-28 ("the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either *excluded or unavailable at trial.* (emphasis added)); Bannister v. Delo, 100 F.3d 610, 618 & n.7 (8th Cir. 1996), cert. denied, 117 S. Ct. 2526 (1997); see also Lucas v. Johnson, 132 F.3d 1069, 1083 n.3 (5th Cir. 1998). "In deciding whether a petitioner has made the necessary showing of innocence, a federal court must make its own determination of whether the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial is sufficient to warrant consideration of the otherwise barred claims. If a petitioner presents evidence of his actual innocence so strong that a court cannot have confidence in the outcome of his state trial, it should not allow his execution unless it is also satisfied that his trial was free of nonharmless constitutional error." Amrine, 128 F.3d at 1227 (quotation omitted). This inquiry may require the Court to make credibility decisions about the witnesses involved. Id. at 1228.

With this legal backdrop in place, the evidence presented at trial and the evidence Petitioner currently relies on

can be considered. The primary evidence against Petitioner at trial was the testimony of Kinney and Black - the surviving victims of the attack. Early in her direct examination, Kinney testified that Petitioner was one of the three individuals who came to the house she shared with Wright, and that the other individuals were Roger Buckner and a man with the last name of "Ford." T.Tr. at 593.[6] She testified that she had been using crack cocaine daily for the past six months, T.Tr. at 595, and that she had been smoking crack the night of January 5 and the morning of January 6. T.Tr. at 596. She explained that she arrived at her brother's house at approximately 7:00 p.m. and, along with five or six other people, smoked crack. T.Tr. at 598-99. Wright, Black, and Black's girlfriend were among the other people there. T.Tr. at 601-02.[7] At approximately midnight, Black drove Wright and Kinney, along with Kinney's sons, Black's girlfriend and Black's brother (Earl) to the house Wright and Kinney shared. T.Tr. at 603. She put her kids to bed, whereupon the adults resumed smoking crack. T.Tr. at 604. At some point, Black and Wright left to take Black's girlfriend and Earl home; approximately forty-five minutes after they returned from this errand somebody knocked at the back door by the kitchen. T.Tr. at 606-07. Kinney answered the door and admitted two people she did not know who were looking for Wright. T. Tr. at 608. (Earlier, Wright had indicated he was expecting some visitors. T. Tr. at 609). Kinney testified that Petitioner was one of the visitors, T. Tr. at 610, and she noticed that he had a solid gold tooth on the right side of his mouth. T.Tr. at 612-13. She also indicated that Buckner looked familiar

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[6]"T.Tr. at __" is a reference to the trial transcript.

[7]Kinney's sons, Deonta and Raymond (ages eight and seven, respectively) were also there, but were in another room and not taking drugs. T.Tr. at 601.

and thought he knew her brother, T.Tr. at 663-64, and recalled seeing a blue van parked outside the house after Buckner and Petitioner came in. T.Tr. at 632.

The visitors and Wright began discussing a drug transaction. T.Tr. at 610. At some point during the conversation someone slammed open the back door and entered the house. T.Tr. at 614. Kinney recognized this third visitor as someone she had seen before but did not recall his name at that time. He told Kinney he was with White and Buckner. T. Tr. at 615. As Kinney returned to the front room and sat on the couch, Petitioner and Buckner drew their guns and Petitioner asked Wright "where the dope was." T.Tr. at 616. After Wright denied having any drugs, Petitioner began hitting him on the head with the gun and kicking him, and kept demanding to know where the drugs and money were. T.Tr. at 617-19. Eventually, Petitioner and Buckner began beating Black as well. T.Tr. at 620.

At one point, Petitioner told Buckner to get something with which to tie Up Wright, and Buckner located an extension cord. They tied Wright's knees and hands together and continued questioning him. When Wright continued to deny having any answers for his attackers, Petitioner took an extension cord and wrapped it around Wright's neck, choking him. T.Tr. at 621-22. When this failed to kill Wright, Buckner made Kinney get on the floor and used her belt and some tape to tie her hands and legs. T.Tr. at 623. Petitioner declared that "[a]ll three of them die." T.Tr. at 624. Buckner went into the kitchen and returned with a kitchen knife. Kinney saw Ford grab Wright's head and hold it back while Petitioner cut Wright's throat. T.Tr. at 626-27. Buckner then made Kinney go into a bedroom. After some debate, he then took the knife from Petitioner and tried to cut Kinney's throat from behind. T.Tr. at 630. The men left soon thereafter.

Kinney's sons contacted the police, and she was taken to the hospital for surgery. She subsequently spoke to the police and was shown some photographs and identified State's Exhibit 102 as a photograph of the man who cut her neck; the picture was of Roger Buckner. T.Tr. at 637-38. She did not recall whether the police ever showed her photographs at any other time that month while she was in the hospital, nor did she recall how many other occasions the police came to the hospital to talk to her. T.Tr. at 638. On cross-examination, she also disavowed any memory of identifying another individual who was never charged. T.Tr. at 650. In March 1987, the police showed her some additional photographs and she identified State's Exhibit 112 as a photo of the third man who had come to her house (Ford). T.Tr. at 639. The following day, she picked Ford out of a lineup. Finally, in May 1997 she viewed a videotaped lineup and identified Petitioner as one of the men at her house. T.Tr. at 644-45. There is no evidence that Petitioner's photograph was ever shown to Kinney prior to her picking him out of the videotaped lineup. Finally, prior to concluding her direct testimony, Kinney was shown three other photographs, one of which (State's Exhibit 121) was a photograph of Christopher (A.J.) Constantine; Kinney testified that none of the people in those three photographs were at her house that night. T.Tr. at 645-46.

On cross-examination, Kinney was asked about her descriptions of the men. She testified that she told detectives Petitioner was "a black male in his late 20's, five-nine to five-ten, about 170 pounds" and denied telling them that any of the three men spoke with a Jamaican accent. T.Tr. at 658. She did not recall telling them that Petitioner had a gold tooth, T.Tr. at 658-59 - although portions of Kinney's statement to police were read at trial, indicating that she did mention his gold tooth. T.Tr. at 661. She also testified that the second man had facial hair. T.Tr. at 661. Upon further questioning about the additional

photos (including Constantine's), Kinney admitted that she knew Constantine to be a drug dealer and that she knew someone named "A.J.", but denied knowing him personally. T.Tr. at 679-80. She also denied telling either her brother or Black that Constantine was one of the men at her house. T.Tr. at 680-81. Petitioner's trial attorney also asked questions demonstrating Kinney's prior drug use. T.Tr. at 669-75.

Black also testified about his prior use of crack cocaine. T.Tr. at 841-42. His testimony about the events of the evening and early morning surrounding the attack substantially mirrors Kinney's testimony. He confirmed Kinney's testimony about a blue van outside her house. T.Tr. at 861-62. He recognized Buckner, but had never seen the second man before. He described the second man as "probably about five-nine, five-ten, probably about 160, and he had a beard, a full beard, and moustache and dark -- well, not real dark skin. He was dark skinned." T.Tr. at 863. Unlike Kinney, he testified that the second man wore a green, red and white stocking cap. Compare T.Tr. at 661 with T.Tr. at 863. Upon viewing Petitioner at trial, Black testified that he looked like "the man that came in with [Roger] Buckner." T.Tr. at 890.

On cross-examination, Black denied knowing anyone by the name of A.J. Constantine or Christopher Constantine. T.Tr. at 895. Upon being shown State's Exhibit 121 (Constantine's picture), Black conceded that he had "some of the same characteristics" as the second man T.Tr. at 896. He denied previously telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine as the second man. T.Tr. at 924, 932. He denied telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine. Black was never explicitly asked if Constantine *was* the second man. To the contrary, he insisted that Petitioner was the second man. T.Tr. at 953-56. He

also denied that the second man spoke with an accent. T.Tr. at 938-39, 955.

Other witnesses linked Petitioner to Buckner and Ford to the crime; still other witnesses confirmed Kinney's and/or Black's identifications and rebutted defense counsel's attempt to case doubt on the validity or consistency of those identifications. Officer Mark Hatcher arrested Buckner (pursuant to an arrest warrant) on April 11, 1987. He found Buckner hiding in a closet in his (Buckner's) girlfriend's apartment. During a search of the premises, he also found a wallet containing Petitioner's driver's license and social security card. T.Tr. at 713. Officer Carl Kegler confirmed that Kinney "immediately recognized [Petitioner] as one of the assailants that had been in the house the night that she was stabbed and Mr. Wright was killed. . . ." T.Tr. at 720. Detective John Peterson testified that he examined Petitioner for distinguishing characteristics shortly following his arrest and that at that time Petitioner had "one solid gold tooth and two open-faced tooths and one of them had three diamonds in it." T.Tr. at 729. Detective Edward Glynn testified that on January 12, 1987 he went to the construction site where Buckner worked in an attempt to find Buckner when he picked up his paycheck. T.Tr. 740-41. By the time he had arrived, Buckner's check had been picked up by someone in a black Cadillac. The Cadillac's trek away from the site was observed by a police helicopter unit, and Glynn was thus directed to a residence in Independence, Missouri. Upon arriving, Glynn found the black Cadillac parked outside a residence. Petitioner was inside the residence. T.Tr. at 741-43. At this time, Petitioner was not a suspect; he voluntarily went to the police station with Glynn, where he was briefly interviewed (by someone other than Glynn) and

photographed. T.Tr. at 742-43.[8]

Detective Clarence Gibson testified that he visited Kinney at the hospital following the attacks. She identified Buckner out of a photo array, but failed to pick Constantine's picture out of a different array. T.Tr. at 753-54. Detective Gibson also testified that he interviewed Petitioner when Detective Glynn brought him to the station. Petitioner told him he had loaned his car to an acquaintance named Larry Thomas (whose address he did not know) for the purpose of picking up Buckner's check. Petitioner admitted knowing who Buckner was and that Buckner was "on the run." T.Tr. at 755. He denied knowing where Buckner was hiding.

Detective Gibson confirmed that Kinney told her the number two man had a gold tooth. T.Tr. at 757. He testified that he showed Kinney another photo array on January 18, 1987 that did not include a picture of either Buckner, White or Ford, and Kinney failed to positively identify anyone in that array. T.Tr. at 758. He showed her an array on March 15, 1987, and she identified Ford as the number three man. Up to this point in time, Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 759, 782-83 - in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.

One of Buckner's co-workers (Earl Wells) testified that he lived across the street from Buckner and regularly rode to work with him. T.Tr. at 958. Buckner owned a white Plymouth

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[8]Glynn had no knowledge as to whether Petitioner's photograph was shown to Kinney when she was interviewed the next day. T.Tr. at 747. Other witnesses denied that this occurred, and nobody testified to the contrary.

or Pontiac, but the last time they rode together Buckner was driving a black Cadillac. On the night of January 5,[9] he saw Petitioner drive Buckner's white car to Buckner's house and knock on Buckner's door. T.Tr. at 968-69. Buckner came out and talked with Petitioner for thirty to forty minutes. T.Tr. at 968-70. Eventually, Petitioner got back in Buckner's car and drove off; Buckner went back into his house. T.Tr. at 970. Later, Buckner drove off in the black Cadillac. T.Tr. at 971.

Detective Lee Floyd testified that he interviewed Kinney's sons. He showed Raymond (the younger child) a photo array that included pictures of Buckner and Constantine, but the boy did not identify anyone in the array. T.Tr. at 988-89. Deonta viewed the same array and indicated that he recognized Constantine but denied that anyone in the array (including Buckner and Constantine) had been at his house on the night of the attack. T.Tr. at 989.

Raymond was one of the Petitioner's two witnesses; at the time he was ten years old. He testified that one of the men that visited his house that night "talk[ed] funny." When asked what kind of voice he understood that to be, Raymond said that it was a "Jamaican accent." T.Tr. at 999. He also testified that he had a chance to see that man's face, and Petitioner was not the man who spoke with a Jamaican accent. T.Tr. at 999-1000. However, when shown a series of photographs (including State's Exhibit 121, Constantine's photo), Raymond denied that any of them looked familiar. T.Tr. at 1000-01.

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[9]Although Wells could not testify as to the precise date, the date can be deduced based on Wells' other testimony and testimony from James Brown (Wells' and Buckner's employer) and Officer Carl Kegler (who went to the construction site and talked to Wells).

As will be discussed in greater detail below, nothing contained in the Appendix or the supplemental affidavits demonstrates Petitioner's actual innocence as contemplated by Schlup. Most of the "evidence" is either not new, not evidence, was readily available to Petitioner, or is not exculpatory.

The Appendix contains the following items:

1. Petitioner's sister (Joyce Williams) provides an affidavit averring that she went to work at approximately 5:00 p.m. on January 5, 1987 and left Petitioner at her house to watch her children. She returned home sometime between 2:00 and 4:00 a.m. the next day, and Petitioner was asleep on a bed. She went to sleep around 8:00 a.m., and Petitioner was still sleeping.

There are two with problems Williams' proffered testimony. First, it is not "new" and was available to Petitioner. Petitioner would have had equal access to information about his own alibi,[10] and Williams communicated her information to Petitioner's trial counsel.[11] Secondly, Williams' statement does not exonerate Petitioner: Kinney testified that she, Wright and

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[10]In fact, Petitioner's pro se brief before the Missouri Supreme Court argued that his attorney should have called an alibi witness, but never identified the witness or divulged the nature of the alibi. White III, 939 S.W.2d at 899.

[11]This latter point raises an interesting dilemma. Petitioner contends that his trial counsel provided ineffective assistance in failing to call Williams to the stand. This claim is defaulted, and Petitioner relies, in part, on the content of the testimony to demonstrate that a miscarriage of justice has occurred. However, because the testimony was known to Petitioner, it cannot be relied upon to demonstrate his actual innocence.

Black arrived at her house at midnight, T.Tr. at 603, and after accounting for all of the intervening events, T.Tr. at 605-07, the men entered her house between 1:30 and 2:00 a.m. Williams provides an alibi that starts, at best at 2:00 and, with certainty, no earlier than 4:00.

2. Frank Johnson provides an affidavit averring that he was riding on a Metropolitan Transportation Service van and overheard a woman who identified herself as Carol Kinney talking to the driver. The woman and the driver appeared to be friends. She told the driver that "a Jamaican named A.J. had broken into her house and killed her boyfriend." Later, while incarcerated in the Jackson County jail, Johnson "ran into" Petitioner and, after talking with him, realized the importance of the woman's statement. Johnson's affidavit does not contain a strong aura of believability. Most importantly, there is no indication that the speaker was actually Carol Kinney.

3. Dan Grothaus, a private investigator, provides an affidavit detailing the results of his investigation. He avers that Kinney's sons identified Constantine as one of the people involved in the murder, but provides no basis for this conclusion. He also provides information about Constantine - he fit the age, height and weight description of the second man supplied by both Kinney and Black, he was a native of Jamaica, and was a crack dealer during the time in question. Grothaus also contacted Kinney in March 1998 and showed her Constantine's picture, whereupon Kinney said "He was there that night" and further identified him as the *third* man to come to her house. She also explained to Grothaus that the hit was meant for her brother's house. Grothaus showed Kinney a picture of Petitioner, and she admitted that the two men looked alike. She continued to insist that none of the assailants had a Jamaican accent. Grothaus contacted Kinney again in April 1998, and she told Grothaus she was sure Petitioner was the

man who killed Wright.

Grothaus spoke with Raymond Kinney in February 1998. He told Grothaus that he "remembers little about the killing and attack. He, however, remembers that one of the suspects spoke with a Jamaican accent."

As indicated above, there is no support for Grothaus' statement that the Kinney children identified Constantine. Raymond's statement that one of the assailants spoke with a Jamaican accent was presented at trial and therefore is not new evidence. Moreover, even if Raymond's statement is true, it does not demonstrate that Petitioner was the mis-identified assailant. Finally, Kinney's statements fall far short of constituting a recanting of her earlier testimony. Cf. Amrine, 128 F.3d at 1228 ("Amrine has come forward with evidence not previously available which directly contradicts the key evidence against him at trial. He now has a sworn recantation by the only previously unchallenged eyewitness, Jerry Poe. Poe's affidavit contradicts what he said at trial. He denies having seen the killing and says his identification of Amrine as the killer was false and induced by pressure from Brooks and Hemeyer."). Any uncertainty about her ability to identify Petitioner more than ten years after the crime are easily understood in light of the passage of time and the apparent physical similarities between Constantine and Petitioner. However, her memory -- and ability to identify her assailant -- was undoubtedly better at the time of trial than it was in March of this year. Finally, all of the information about Constantine's criminal activity is irrelevant to Petitioner's guilt or innocence absent some independent link between Constantine and Wright's murder - a link that Petitioner fails to establish.

4. Roger Buckner has submitted an affidavit admitting that he was one of the three men who entered Kinney's residence

and that he has been sentenced to life in prison for his role in Wright's killing. However, he denies that Petitioner was present and disavows Petitioner's involvement in any way. Buckner's affidavit might be more persuasive if he identifies the other two men who were with him. In any event, the affidavit does not undermine this Court's confidence in the jury's verdict.

5. Charles Ross, a private investigator, prepared a report of his interview with Black in July 1987. The only potentially exculpatory information contained in Ross' report is the following: "Carol Kinney told him one of the other guys had the street name of 'A.J.', but that he was not sure which one she was talking about." Black's statement to Ross is not evidence, and Black denied the substance of the statement at trial - so the possibility that Kinney made the statement to Black is not really new. Moreover, the statement does not identify the second man as A.J., so it does not exonerate Petitioner.

6. Laura Tyler, an attorney with the State Public Defender, wrote a letter to Petitioner's lead trial counsel, Robert Duncan. The important part of Tyler's letter appears to be her suspicion that the police showed Petitioner's picture to Kinney prior to the time admitted to by the police at trial. Even if this "belief" were evidence, it does not demonstrate Petitioner is factually innocent of the crime.

7. Reports prepared by police following interviews with Raymond, Deonta and Carol Kinney are included in the Appendix. They were also used by Petitioner's trial counsel at trial (to the extent permitted by the rules of evidence), so Petitioner cannot contend they were unavailable. Moreover, they do not provide any new information.

8. Raymond, Deonta, and Carol Kinneys' statements were also transcribed. What has already been said about the police

reports in the preceding paragraph applies with equal force to these statements.

9. A police report of an interview with Freddie Wright (Don Wright's brother) dated January 6, 1987 relates that upon being shown Buckner's mug shot, Freddie Wright "indicated that he does not know his name, but indicated that he runs around with Jamaicans." This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that a Jamaican (much less Constantine) was with Buckner the night Wright was murdered, nor does it demonstrate that Petitioner was not.

10. A police report of an interview with Ben Kinney (Carol Kinney's brother) dated January 7, 1987, summarizes his statements to the effect that he had previously sold drugs for "two black males he knows only as AJ [sic] and Josh, who pretend to be Jamacians [sic]." Ben also indicated that they held him responsible for a shortage in money. This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that A.J. was - or Petitioner was not - involved in Wright's murder.

11. A police report dated January 14, 1987 indicates that Jeanette Rambo, sister of Steve Rambo, told Kinney "that the # 2 suspect" used to stay with her brother; she did not know his name "but said his moniker was 'Monster Man.'" The report indicates that the police were not familiar with anyone known to use that nickname. As with the prior police reports, this one appears to have been available at trial. Moreover, it contains no evidence demonstrating Petitioner's innocence.

12. The Appendix contains a police report from a completely unrelated case describing the taking of a Polaroid photograph of a suspect. Petitioner offers this report to show

that such events are usually described in police reports, whereas in this case no police report indicates that Petitioner's photograph was taken. This information has no bearing on Petitioner's factual innocence.

13. Depositions of Black, Kinney, and Kinney's sons are included in the Appendix. Although Petitioner's trial counsel did not attend the depositions, he had copies of the transcripts and used them (to the extent he could) during Petitioner's trial. The information they contain is neither new nor unavailable.

14. The final two documents in the Appendix are transcripts of Deonta's and Raymond's testimony at Buckner's trial. Buckner's affidavit indicates he was convicted in February 1989; but in his Amended Petition for Writ of Habeas Corpus he alleges that he went to trial in October 1988. Amended Petition, ¶ 51. The transcript from Petitioner's trial indicates Raymond testified in his trial on February 6, 1989, and Deonta did not testify at all. It thus appears that the transcript from Buckner's trial was available at the time of Petitioner's trial. In addition, Raymond and Deonta were available as witnesses at the time of Petitioner's trial.

Nonetheless, assuming that these materials are new and can be considered in a Schlup inquiry, they do not constitute unassailable proof of Petitioner's innocence. Raymond identified one of the men as having long, curly black hair and another man as being "chubby." He further identified the chubby man as being someone he had seen at Ben's house and knew his name to be A. J. He also testified that the chubby man talked like a Jamaican. This testimony is simply evidence that contradicts other evidence offered at Petitioner's trial - it is not a particularly trustworthy eyewitness account, nor does it affect the Court's confidence in the verdict. In addition to concerns about Raymond's opportunity to see the assailants, the Court

notes that Raymond also testified that Buckner as not one of the three men - a fact that is contradicted by Buckner's affidavit - and that when shown Constantine's picture during the trial, he denied that Constantine was one of the three men.

Deonta also testified that one of the three men was "chubby" and identified him as "A.J." He was unable to identify the other three men, and was never asked whether Petitioner was one of the men. Deonta's testimony is not so persuasive or forceful to make it more believable than Black's or his Carol Kinney's.

The affidavits offered to supplement the Appendix do not alter the Court's conclusions. Ford submits an affidavit admitting that he was involved in the killing and identifying "Roger Buckner and a Jamaican friend of his" as the other two men involved. He admits that at his plea hearing (for second degree murder), he told the judge that Petitioner was involved, but now contends that this was not true and that Petitioner was not involved. Contradictory statements offered under oath do not persuade the Court that Petitioner is actually innocent.

Charles Ross submits an affidavit that is substantially the same as his report described on page 19, supra, and it includes a copy of that same report. The Court's earlier comments apply to Ross' new affidavit.

Buckner has submitted a second affidavit swearing that the other men involved with him were Ford and Constantine, and explaining that he was "reluctant to identify A.J. Constantine as the second man involved in the killing of Don Wright . . . for fear of reprisals against my family, and because I think it is wrong to tell on a person."

As noted earlier, the Court is empowered to consider

issues related to credibility. Assuming no other faults exist with respect to Buckner's latest affidavit, the Court does not believe that his change of heart after ten and half years of silence outweighs the eyewitness testimony of two of the victims. The fact that one of the men convicted of murdering Wright is now willing to exculpate Petitioner does not undermine the Court's confidence in the jury's verdict.

Finally, Dorothy Merrell - the mother of Ben Kinney's girlfriend - offers an affidavit dated August 25, 1998 indicating that on the night of January 5, 1987, Wright, Ben and her daughter "were in her house with two other men. One of the men she "now understand[s]" was Roger Buckner, and the other was a man she knew as "J" and she has since identified as Constantine. Wright bragged about having a lot of drugs and invited the man she now identifies as Constantine to come to his house at about 3:00 to buy some. Merrell also avers that Kinney told her that the men who killed Don Wright were the same people that were at her house.

Petitioner presents no indication that Merrell was unavailable as a witness. Moreover, she was not a witness to the crime, and does not exculpate Petitioner.

Having considered all of the evidence offered by Petitioner, the Court concludes that Petitioner has failed to satisfy Schlup's standards for demonstrating a miscarriage of justice. The evidence that Schlup permits the Court to consider does not undermine the Court's confidence in the jury's verdict of guilt.

B. Ineffective Assistance of Postconviction Counsel, Part I

Petitioner concedes that the Eighth Circuit has

repeatedly held that ineffective assistance of postconviction counsel cannot serve as cause and prejudice justifying removal of the procedural bar, but contends the Supreme Court left the issue open in Coleman v. Thompson, 501 U.S. 722 (1991). The Court disagrees with Petitioner's characterization of Coleman. "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752 (citations omitted). In any event, Petitioner has accurately summarized the holding of cases from the Eighth Circuit. E.g., Sidebottom v. Delo, 46 F.3d 744, 751 (8th Cir.), cert. denied, 516 U.S. 849 (1995); LaRette v. Delo, 44 F.3d 681, 687-88 (8th Cir.), cert. denied, 516 U.S. 894 (1995); Pollard v. Delo, 28 F.3d 887, 889-90 (8th Cir.), cert. denied, 513 U.S. 1003 (1994); Jolly v. Gammon, 28 F.3d 51, 54 (8th Cir.), cert. denied, 513 U.S. 983 (1994); Nolan v. Armontrout, 973 F.2d 615, 617 (1992); McCoy v. Lockhart, 969 F.2d 649, 650-51 (8th Cir. 1992); Johnson v. Lockhart, 944 F.2d 388, 390 (8th Cir. 1991). Therefore, ineffective assistance of postconviction counsel cannot serve as a basis for excusing the procedural bar.

C. Abandonment by Postconviction Counsel

In an argument the Court considers related to the discussed above, Petitioner relies on White II's conclusion that he was abandoned by the first attorney to represent him in postconviction proceedings. Given that Petitioner was not constitutionally entitled to a hearing in the postconviction proceeding, and given that he was not entitled to constitutionally effective legal assistance in that proceeding, Petitioner's argument appears doomed. This conclusion is reinforced by an Eight Circuit opinion to this effect. Mack v. Caspari, 92 F.3d 637, 639-40 (8th Cir. 1996), cert. denied, 117 S. Ct. 1117 (1397). Similarly, Petitioner's argument regarding

the sufficiency of the Missouri Supreme Court's remedy for the abandonment is beyond this Court's consideration. Id. at 640.[12]

D. Adequacy of State Grounds

Finally, Petitioner contends that the grounds relied upon in White III are inadequate to serve as the foundation for a procedural default. "The state procedural rule must be both firmly established and regularly followed.., to preclude federal review." Reese v. Delo, 94 F.3d 1177, 1181 (8th Cir. 1996), cert. denied, 117 S. Ct. 2421 (1997).

The Court disagrees with Petitioner's contentions. In cases decided before the First Amended 29.15 Motion was filed, Missouri courts frequently held that "[i]n order to qualify for an evidentiary hearing, movant must meet three requirements: (1) The motion must allege facts, not conclusions, warranting relief; (2) those facts must raise matters not refuted by the files and records in the case; (3) the matters complained of must have resulted in prejudice to the defendant." Ahart v. State, 732 S.W.2d 256, 257 (Mo. Ct. App. 1987); see also Thomas v. State, 605 S.W.2d 792, 794-95 (Mo. 1980) (en banc); Rice v. State, 585 S.W.2d 488, 493 (Mo. 1979) (en banc); Smith v. State, 652 S.W.2d 134, 134 (Mo. Ct. App. 1983); Kearns v. State, 583 S.W.2d 748, 750 (Mo. Ct.

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[12]The Missouri Supreme Court specified that the remedy had to be tailored to the nature of the abandonment; here, the nature of the abandonment dealt with the *timing* of Petitioner's postconviction motions, not their *content*. White II, 873 S.W.2d at 598-99. The Missouri Supreme Court never held that Petitioner's postconviction counsel abandoned him (as that concept is defined in Missouri law) in any respect other than the timing of the motion's filing.

App. 1979). In its last version (before being repealed in favor of Rule 29.15 in February 1987), Rule 27.26 declared that an evidentiary hearing was to be held "if issues of fact are raised in the motion." Rule 27.26(e). In addition, Rule 27.26(c) declared that the motion "must be submitted on a form substantially in compliance with the form appended" to the Rule, and Part 9 of the form requires the petitioner to "[s]tate concisely . . . the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts." Similar language appeared in Rule 29.15(b). Cf. White III, 939 S.W.2d at 893. The Court thus concludes that the need to plead facts in a postconviction petition was well-established prior to the adoption of Rule 29.15, and the language of Rule 29.15 is similar language to the language from Rule 27.26 that originally gave rise to the judicial holdings requiring facts to be plead. The Court rejects Petitioner's argument that this pleading requirement was novel or not regularly followed.

III. PETITIONER'S ENTITLEMENT TO A HEARING

Petitioner is not entitled to a hearing on his claims for relief.

> A habeas corpus petitioner is entitled to an evidentiary hearing on the allegations contained in the petition if: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the

> statecourt [sic] hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Williams v. Clarke, 40 F.3d 1529, 1543 (8th Cir. 1994), cert. denied, 514 U.S. 1033 (1995) (quotation omitted). Stated more succinctly, "a habeas petitioner is entitled to an evidentiary hearing in federal court if the petition alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996). However, a hearing is not required with respect to those claims that are procedurally defaulted or that are clearly without merit. E.g., Zeitvogel v. Delo, 84 F.3d 276, 281-82 (8th Cir.), cert. denied, 117 S. Ct. 368 (1996); Toney, 79 F.3d at 697; Wilson v. Kemna, 12 F.3d 145, 146 (8th Cir. 1994). Most of Petitioner's claims have been procedurally defaulted; the remaining claims can be addressed based on the record already developed by the state courts.

IV. SUBSTANTIVE CLAIMS FOR RELIEF

A. Ineffective Assistance of Trial Counsel:[13] Voir Dire, Part I

Petitioner contends that his trial counsel was ineffective based on his performance during voir dire. In summary, Petitioner complains that trial counsel allowed the prosecutor to "completely dominate the voir dire" and asked very few questions. As a result, trial counsel allegedly missed opportunities to ferret out grounds for challenging jurors for cause or to rehabilitate them in the face of the prosecutor's

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[13]Robert Duncan was lead trial counsel, and John O'Connor was his second chair. Unless otherwise indicated, the term "trial counsel" is intended to refer to both attorneys.

challenges and educate the jury about the death penalty and Petitioner's theory of defense. Petitioner does not contend that his jury was biased; instead, he argues that he was prejudiced because the jury that decided his case was "prosecution oriented."

The first and foremost reason for rejecting Petitioner's argument is that it was largely procedurally defaulted and there are no grounds for excusing the procedural default. See White III, 939 S.W.2d at 900. This, alone, justifies rejection of Petitioner's argument without further discussion.[14]

One narrow issue included within this claim was not defaulted: Petitioner's claim that trial counsel was ineffective for failing to rehabilitate Venireman Danny Robertson, who was eventually struck for cause. A claim of ineffective assistance of counsel is analyzed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995), cert. denied, 517 U.S. 1214 (1996) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir.

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[14]Nonetheless, the Court notes that the record demonstrates that trial counsel's decision was the product of a conscious decision to avoid overemphasizing the fact that this was a death penalty case. T.TR. at 7. Petitioner ridicules this tactic, but it is not so absurd as to violate trial counsel's constitutional obligation to provide effective assistance at trial. Furthermore, Petitioner is unable to demonstrate that the composition of his jury would have been any different had trial counsel acted differently. Cf. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997), cert. denied, 118 S. Ct. 2352 (1998).

1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim, see Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness").

In order to properly evaluate Strickland's prongs, the law regarding disqualification of jurors must be considered. A juror is to be disqualified if that "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quotation omitted). This standard "does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. Finally, "the

question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428. Consequently, the state court's factual determination regarding a potential juror's views is entitled to deference from this Court. Id.

Petitioner does not challenge the trial court's decision to strike Robertson, and based on Robertson's statements during voir dire such an effort would be futile. Robertson approached the bench and told the trial judge

> Well, I'm having some problems here kind of dealing with this. I always prided myself on being able to make decisions. That's all I do at work. But to decide possibly whether another human being might be put to death, I'm going to have some real problems with that, just my own emotional well being.

T.Tr. at 206. After Robertson finished discussing his personal difficulty with being on the jury, the trial judge asked him if he "could consider the full range of punishment," to which Robertson replied "I always thought I could until today, and I don't think I could." T.Tr. at 207-08. After Robertson and the other jurors left the courtroom, the prosecutor and the judge had the following exchange:

> Prosecutor: I just wanted the record to reflect that [Robertson's] demeanor was visibly shaken, something that doesn't come across on the record. But it was

clear that the thought of being on this jury was deeply, deeply troubling to him.

The Court: I observed that as well. His eyes were misty and his face was - his lips were quivering, and he was very nearly becoming emotionally distraught, I think, about the prospect of serving in a death case, and that was the reason the Court sustained the State's motion.

T.Tr. at 210-11. Petitioner does not suggest what, if anything, his trial counsel could have done or said to alter Robertson's inevitable removal for cause, and thus fails to demonstrate any possible basis for concluding that trial counsel's performance was constitutionally deficient. In addition, Petitioner's allegation of prejudice is too speculative to credit.

B. Informing Jurors About the Governor's Power to Pardon

Petitioner contends the trial court violated commands of the United States Supreme Court when it told potential jurors that the Governor could pardon Petitioner. Specifically, the trial court made the following statements during small-group voir dire:

> But I guess the ultimate question is, is if the defendant is found guilty could you consider as a possibility the death penalty as a range of punishment? The range of punishment if he's found guilty of first degree murder, the range of punishment is life imprisonment without parole

unless he's pardoned by the governor, or death. That's the range. And could you consider the full range of punishment?

* * *

If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without parole except by pardon by the governor.

Would you be able to consider both of these possible punishments?

* * *

If the jury finds the defendant guilty of murder in the first degree after all the evidence is presented, then the possible sentences, the only possible sentences, are death or life imprisonment without possibility of release unless the governor pardons the defendant. Would you be able to consider both of those possible punishments, death and life imprisonment without release? That's the question.

* * *

If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without possibility of release except by order of the governor. Would you be able to consider both of these punishments after such a verdict of

guilty?

T.Tr. at 207, 243, 285, 304-05. Petitioner contends these statements violated Caldwell v. Mississippi, 472 U.S. 320 (1985), which prohibits tactics, comments or instructions that minimize the jury's "truly awesome responsibility" in death penalty cases. As summarized by the Court, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

In a case predating Caldwell, the Supreme Court held that a jury could be told of the possibility that a defendant's life sentence could be commuted. California v. Ramos, 463 U.S. 992, 1001-06 (1983). The Caldwell Court specifically adhered to Ramos, citing the "valid sentencing need to give more information on the Governor's power to commute life sentences," which Ramos held bears on the appropriateness of a life sentence. Caldwell, 472 U.S. at 337; see also Caldwell, 472 U.S. at 335-36. In light of these distinctions, the Eighth Circuit has already rejected an argument very similar (if not identical) to the one Petitioner now advances. Bannister v. Armontrout, 4 F.3d 1434, 1444 (8th Cir. 1993), cert. denied, 513 U.S. 960 (1994). Petitioner's second point is rejected.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

Petitioner contends that his trial counsel provided ineffective assistance when he failed to object to the Court's statements described in Part IV.B, supra. As explained earlier, the trial court's comments did not violate Caldwell, so the failure to object could not have prejudiced Petitioner.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror

After the Petitioner rested his case in chief, but before final instructions were read, the bailiff brought a matter involving one of the jurors (Ruth Tuggle) to the trial court's attention. The bailiff related her observations in open court with Petitioner (but not the jury) present:

> The juror, Mrs. Tuggle, has expressed her desire to hurry the deliberation. She's asked twice at least in the past 24 hours whether it lasts very long. She several times has discussed murders and brought up the case about Ted Bundy being murdered, and he deserved what he got.
>
> There's some concern as to whether she's really paying attention. She doesn't seem quite with it. The other jurors also feet that maybe she's not, or it's hard communicating with her.
>
> I've told her the rules of being a sequestered juror, watching the TV news, what program[s] she can or can't watch, and she just doesn't see[m] to be able to follow those instructions.

T.Tr. at 1026. Petitioner's counsel then asked Petitioner whether it was his desire to keep Tuggle on the jury, and he declared that it was. T.Tr. at 1026.

Petitioner now contends that his attorney was constitutionally ineffective for failing to seek Tuggle's removal. This claim of ineffective assistance was not presented in either

his pro se 29.15 Motion[15] or the First Amended 29.15 Motion, nor was it raised on appeal to the Missouri Supreme Court. The claim has been procedurally defaulted and there is no basis for overcoming the procedural bar, so it must be rejected.

E. Right to Fair and Impartial Jury

Relying on the same facts described in Part IV.D, supra, Petitioner contends that allowing Tuggle to remain on the jury violated his right to a fair and impartial jury. Tuggle's inclusion on the jury was not objected to at trial and was not raised on direct appeal and therefore has been defaulted. Petitioner cannot rely on his attorney's failure to object as cause and prejudice because that claim of ineffective assistance was itself procedurally defaulted, as discussed in Part IV.D, supra. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996) ("the performance of trial counsel is irrelevant to the cause [and prejudice] inquiry where the petitioner fails to raise the ineffective assistance of trial counsel claim in state court proceedings.").

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

Following general voir dire, the trial court questioned the panel in small groups consisting of five panel members in

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[15]White III discussed claims raised on appeal that were previously raised only in Petitioner's pro se 29.15 Motion. Most of those claims failed to satisfy the pleading requirements, but the fact that they were discussed suggests that the Missouri Supreme Court was willing to consider the arguments if they had been properly pleaded.

order to assess their ability to fairly consider both of the possible punishments in the event Petitioner was found guilty of first degree murder. During this stage, Venireman Layson initiated a discussion demonstrating his concern as to what would happen if the jury found Defendant guilty of second degree murder, and whether there would still be a need for a penalty phase in the trial. He also indicated that he did not believe the prosecutor was being completely truthful because the prosecutor was not mentioning the possibilities of acquittal or conviction on a lesser offense. T.Tr. at 373-78. The prosecutor moved to strike Layson for cause because he indicated a bias against the prosecutor and because he appeared likely to draw upon and share "extrajudicial knowledge" with the other jurors. The trial court agreed, saying it would "strike him for cause because I think he presents a danger not only to the State, I think also to the defendant, if he's a loose gun." T.Tr. at 389. The judge approved the prosecutor's request to excuse Layson immediately so as to prevent him from talking to the other members of the panel. T.Tr. at 390, 400-01. Petitioner's trial counsel objected to the removal and raised the issue in his Motion for New Trial. However, the issue was not raised on direct appeal, giving rise to the instant claim.

The Sixth Amendment guarantee of effective assistance of counsel applies on direct appeal. Because of Strickland's strong presumption that there is a wide range of reasonable professional conduct "and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or nonfrivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe v. Delo, No. 97-4078, slip op. at 4 (8th Cir. Oct. 30, 1998) (citations and quotations omitted). In evaluating the failure to include this issue on appeal, as well as the prejudice to Petitioner for that

failure, the Court must consider the legal analysis that would have applied to the claim. In light of the low level of scrutiny accorded to a trial judge's decision that a potential juror is biased, see Part IV.A, supra, counsel's decision not to raise the issue on appeal cannot be faulted. Moreover, the Court sees nothing in the record that would have justified second-guessing the trial court's decision, particularly after considering the deference with which that decision would be reviewed.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 289-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and his trial counsel's failure to remedy this error constituted ineffective assistance of counsel.

This claim of ineffective assistance was not presented in either the pro se 29.15 Motion or the First Amended 29.15 Motion, and has therefore been procedurally defaulted.[16] Moreover, the claim was not raised on appeal to the Missouri Supreme Court. There being no basis for overcoming the

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[16]For that matter, this argument is not raised in the Second Amended 29.15 Motion that the Missouri Supreme Court refused to consider as improper under state rules. Therefore, even if the Missouri Supreme Court "should have" considered the second motion (an issue the Court has already ruled is beyond its power to adjudicate, see Part II.C, supra), the issue would still have been defaulted.

procedural bar, the claim must be rejected.

Apart from the procedural problem, the Court notes that Petitioner has improperly and unfairly described the prosecutor's actions. The relevant portion of the transcript reflects the following discussion:

Prosecutor #1:	Judge, we have enough, if we want *to save* a bunch of time, I think both parties would agree we could excuse - I think there were eleven, is that right?
Prosecutor #2:	Eleven people on sequestration
Prosecutor #1:	That should take us down to 40 [venirepersons].
The Court:	Well, if we're going to do that by agreement I have no objection to that. So if I have the right list, that's [venirepersons] 23, 25, 27, 20, 46, 33, 69, 45, 73, 90 and 92.
Prosecutor # 1:	That's what our numbers show.

Prosecutor # 2:	I think it's 42, Judge.
The Court:	That's what I started to question. That looks more like a 4 than it does a 9. Yes, Carder. I had the name down. 42. Well, I'm not going to do that unless it's by agreement.
Defense Counsel:	I'm just checking, Judge. I'll agree to it.
The Court:	Do you understand, Mr. White.
Defendant:	(nods head).
The Court:	You have no objection to it?
Defendant:	No, sir.

Tr. at 493-94. This discussion demonstrates that this list was not offered as a list of potential jurors that had been struck for cause; it was a list of jurors the two sides mutually agreed could be struck. The Court made clear that absent the agreement, these jurors would not be struck. (Interestingly, the fact that Defendant's trial counsel made the agreement was itself offered as a ground for relief in the Second Amended 29.15 Motion. See L.F. at 28.).[17] Finally; the prosecutor did not "slip" Brison

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[17]Separate Legal Files (indicated by "L.F. at __") were created each time this case was remanded to the trial court. The

onto a list of jurors who had been struck for cause because *nobody* on this list was struck for cause. See T.Tr. at 245-50, 273-74, 291-92, 307, 321, 340-41, 365, 384, 389, 401, 413-14, 434, 444 (portions of transcript referencing jurors who were struck for cause). The Court thus concludes that even if this claim were not procedurally defaulted, it would be denied because it lacks merit.

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

In this claim of ineffective assistance of counsel vis-a-vis voir dire, Petitioner contends his trial attorney failed to "question jurors on their views about a number of issues that would come up during the case, including witness identification and misidentification, graphic photograph and crime-scene details, and drug use." As with Petitioner's first claim regarding ineffective assistance during voir dire, see Part IV.A, supra, this claim was procedurally defaulted when Petitioner failed to satisfy the state pleading requirements for obtaining a hearing on this issue, so the claim is procedurally defaulted.

I. Ineffective Assistance of Trial Counsel:

Failure to Investigate and Introduce Evidence of Innocence

Petitioner contends that his attorney was ineffective for failing to introduce evidence of his innocence. Much of the evidence Petitioner refers to on this point was already discussed

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Court's references to the Legal File will be to the one bearing Number 78459, which is the case number for White III and appears as Respondent's Exhibit BB in this Court's file.

in Part II.A, supra. In addition, Petitioner finds fault with counsel in the following respects:

1. During the crime, Buckner told suspect two that Ernest Black was Earl Black's brother, which suspect two acknowledged. Petitioner contends that had counsel talked to Earl Black, he would have learned that Earl Black does not know Petitioner.
2. Counsel failed to interview Steve Rambo (Buckner's roommate), who owned a blue van similar to the one described by Kinney and Black.
3. Counsel failed to interview Constantine.
4. Counsel failed to interview Wright's family members who reported seeing people "matching the descriptions of Suspect Two and Suspect Three watching their house after the crime."
5. Ben Kinney "saw black men he believed to be Jamaicans driving by his house in a van" but counsel never interviewed him.

Some of these matters were raised in the First Amended 29.15 Motion. There is no need to parse out those that were raised and those that were not because *none* were raised on appeal to the Missouri Supreme Court. Consequently, this claim has been procedurally defaulted.

J. Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence

Petitioner contends that his trial counsel provided constitutionally defective assistance during the penalty phase of his trial when he failed to investigate, unearth, and introduce mitigating evidence. This issue was not raised in the pro se

29.15 Motion, First Amended 29.15 Motion or on appeal to the Missouri Supreme Court, and so has been procedurally defaulted.[18]

K. Eighth Amendment Violation: Lack of Mitigating Evidence

In an argument related to trial counsel's failure to present certain evidence in mitigation of the death sentence, Petitioner argues that he was abandoned[19] by counsel during the penalty phase of the trial. He further argues that imposition of a death sentence under these circumstances was tantamount to explicitly instructing the jury to ignore mitigating circumstances and thus violates the Eighth Amendment.

Petitioner's argument was not presented to the Missouri courts for consideration. In addition, Petitioner's argument - that an attorney's failure to introduce mitigating evidence constitutes a violation of the Eighth Amendment (as opposed to the Sixth Amendment) - requires creation of a new constitutional rule that cannot be announced in a habeas proceeding. Teague v. Lane, 489 U.S. 288, 316 (1989).

L. Trial Counsel's Conflict of Interest

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[18]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 13, supra.

[19]Lest there be any confusion, it must be pointed out that in arguing his attorney abandoned him, Petitioner does not suggest that was unrepresented during the penalty phase. The prosecutor introduced documents reflecting Petitioner's criminal history, then both sides presented closing argument. T.Tr. at 1054-55.

At various points during the trial, trial counsel asked Petitioner to endorse or acknowledge certain decisions made with respect to his defense. The topics in question included:

- O'Connor would be assisting in the case, T.Tr. at 4-5
- the decision not to call an eyewitness identification expert, T.Tr. at 5-6
- the decision to "de-emphasize" the death penalty during voir dire, T.Tr. at 7
- Petitioner never told trial counsel that he suffered from any mental problems, T.Tr. at 7-8
- he was satisfied with the representation he had received to that point, T.Tr. at 8-9.
- he had no problem with letting the judge re-read an instruction to the jury, T.Tr. at 926-27
- he understood his right to testify and chose not to exercise that right, T.Tr. at 1011-15
- certain witnesses would not be called, T.Tr. at 1015-16
- lesser included offense instruction would not be requested, T.Tr. at 1016-18
- the risks associated with calling witnesses to offer mitigating evidence, T.Tr. at 1032-34
- he understood his right to testify during the penalty phase and chose not to exercise that right, T.Tr. at 1047-51

Petitioner challenged these actions in his initial, pro se 29.15 Motion; in doing so, he couched his argument in terms of ineffective assistance of counsel. L.F. at 11. Petitioner now contends that the Missouri Supreme Court should have considered this claim as one asserting a conflict of interest and should have applied Cuyler v. Sullivan, 446 U.S. 335 (1980)

instead of Strickland.

The argument was not raised as a claim of conflict of interest in state court, so the claim has been defaulted.

> In order to present a habeas claim to the state court, a prisoner must "fairly present" not only the facts, but also the substance of his federal habeas corpus claim. In this circuit, to satisfy the "fairly presented" requirement, [a petitioner is] required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in the Missouri state court.

Abdullah v. Groose, 75 F.3d 408, 411-12 (8th Cir.), cert. denied, 517 U.S. 1215 (1996). Petitioner never contended that the actions described above constituted a conflict of interest, nor did Petitioner cite or make any other reference to Cuyler, so Petitioner never fairly raised this issue in state court.

In any event, the Court doubts that this claim has any merit. Placing a criminal defendant on the stand to confirm his or her understanding of and acquiescence in his rights and strategic decisions about his case does not place the attorney at odds with his client. Moreover, criminal defendants are frequently questioned to insure they understand their right to testify on their own behalf and that the decision to (or not to) testify belongs solely to them. Although the questioning of Petitioner went beyond this issue, the Court does not believe that asking such questions constitutes a conflict of interest between attorney and client.

M. Ineffectiveness of Appellate Counsel: Myriad of Claims

Within this single claim, Petitioner alleges his Appellate Counsel provided ineffective assistance by failing to raise fourteen distinct claims of ineffective assistance of trial counsel. Claims of ineffective assistance of trial counsel are to be asserted in a postconviction proceeding. As discussed in Part I.B, supra, Petitioner's postconviction proceeding was governed by Missouri Rule of Criminal Procedure 29.15, which at that time[20] was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of postconviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). "Following the filing of a Rule 29.15 motion, the defendant litigates his or her Rule 29.15 claims through the sentencing court while the direct appeal is held in abeyance. If the sentencing court denies Rule 29.15 relief, a separate notice of appeal must be filed in the sentencing court if the defendant desires to appeal issues raised in the 29.15 motion." Id. at 819. The two appeals are consolidated into a single "hybrid" appeal, but "Rule 29.15 contemplates that the direct appeal and the 29.15 appeal retain their independent identity even though consolidated." Id.

A consequence of the separate appeals retaining their individual character is that the obligation to pursue an appeal from the 29.15 ruling rests with postconviction counsel, not appellate counsel. "No Missouri rule of appellate procedure or criminal procedure relieves post-conviction relief counsel of his or her duties before the time arrives for filing the notice of appeal challenging the denial of Rule 29.15 relief." Id. This is true even though the same attorney is performing a dual role: appealing issues in the direct appeal *and* appealing issues raised

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[20]Rule 29.15 was amended effective July 1, 1997; the amended version does not apply to Petitioner. Rule 29.15(m).

in the 29.15 proceeding. Petitioner is not entitled to effective assistance of counsel in a postconviction proceeding, Coleman v. Thompson, 501 U.S. 722 (1991), and therefore is not entitled to effective assistance of counsel in an appeal from the postconviction proceeding. Lowe-Bey, 28 F.3d at 819-20. Thus, when the appellate counsel is performing his function of appealing issues from the 29.15 proceeding, there is no Sixth Amendment protection; the Sixth Amendment only applies to the attorney's performance with respect to issues arising from the direct appeal. In this claim, Petitioner attacks his appellate counsel's performance in his 29.15 appeal role, not his direct appeal role; there being no constitutional guarantee of effectiveness for the former role, Petitioner's claim is not cognizable.

N. Due Process Violation: Abandonment by Postconviction Counsel

This argument is similar to one advanced by Petitioner as grounds for excusing procedural default, and was addressed in Part II.C, supra. To the extent that the argument relies on the Fourteenth Amendment instead of the Sixth Amendment, granting relief requires creation of a new constitutional rule and the Teague bar applies.

O. Due Process: Pleading Requirements

Petitioner attacks the Missouri Supreme Court's determination that his First Amended 29.15 Motion was insufficient under state law to secure him a hearing, and contends the holding was new and applied for the first time in this case. The Court doubts this issue is cognizable because it involves interpretations and application of state law. In any event, the Court rejects Petitioner's argument. See Part II.D, supra.

P. Due Process: Rule 29.15's Deadlines

Petitioner contends that his Due Process rights were violated by Rule 29.15's strict deadlines. This argument has previously been rejected by the Eighth Circuit. Kilgore v. Bowersox, 124 F.3d 985, 993 (8th Cir. 1997), cert. denied, 118 S. Ct. 2342 (1998); Sloan v. Delo, 54 F.3d 1371, 1379-80 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996).

Q. Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams

Petitioner alleges that his trial counsel failed to interview his sister and call her as a witness at trial. Petitioner did not raise the former issue in either his pro se 29.15 Motion or his First Amended 29.15 Motion[21] and is now procedurally barred from raising the issue. (Besides, in the affidavit she supplied for the Appendix, Williams avers that she did speak with Petitioner's trial counsel). In his pro se 29.15 Motion, Petitioner alleged that his trial counsel was ineffective for failing to call Williams as a witness, but the claim was unreviewable because he did not satisfy the pleading requirements. White III, 939 S.W.2d at 899. Consequently, this claim has been defaulted.

R. Ineffective Assistance of Trial counsel: Failure to Give an Opening Statement at the Beginning of Trial

The prosecutor delivered an opening 'statement prior to the introduction of evidence. T.Tr. at 503-30. Petitioner's trial counsel reserved his opening statement, T.Tr. at 530, and delivered one after the state rested. T.Tr. at 996-98. In this

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[21]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

claim, Petitioner attacks both the content and the timing of his attorney's opening statement. This claim was not raised in the First Amended 29.15 Motion or presented to the Missouri Supreme Court, so the claim has been defaulted.

S. Ineffective Assistance of Trial Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack cocaine - such as Kinney and Black - suffer damage to their ability to perceive and remember events. The issue was raised in Petitioner's pro se 29.15 Motion, L.F. at 17, but failed to satisfy Rule 29.15's pleading requirements. Consequently, the Missouri Supreme Court refused to review the issue, White III, 939 S.W.2d at 898-99, and the claim is procedurally defaulted.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

Petitioner contends that the prosecutor gave insufficient notice of its intent to submit the aggravating circumstances reflected in Instructions 13 and 14 to the jury. Petitioner basis this argument on "Mo. Rev. Stat. § 565.005, due process under the Fourteenth Amendment and freedom from cruel and unusual punishment under the Eighth Amendment." He also contends that two of the instructions were vague. The first permitted the jury to find an aggravating circumstance because Petitioner and his cohorts purposely left gas stove's burners on and blew out the pilot light, thereby "created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. . . ." The second allegedly vague instruction asked the jury to consider whether Wright's murder "involved torture, and that as a result thereof it was outrageously or wantonly vile,

horrible, or inhuman"

Petitioner's arguments have been procedurally defaulted because they were not presented to the Missouri Supreme Court and were not raised in his pro se or First Amended 29.15 Motions. Even if the instructions were unconstitutionally vague, Petitioner could not satisfy Strickland's prejudice prong because Missouri is a "nonweighing" state, meaning that "a finding of at least one aggravating circumstance is a threshold requirement to imposing a death sentence." Sloan, 54 F.3d at 1386. As long as the jury validly found at least one aggravating circumstance, an improper instruction is of no consequence. Here, the jury found additional statutory aggravating factors (e.g., that Petitioner had prior felony convictions, that the murder was committed while other crimes (other attempted murders) were being committed, and that the murder was committed in connection with a robbery). Direct Appeal Legal File at 17-18. Assuming an uncured unconstitutional vagueness in the instructions, "[t]he jury's penalty phase verdict is... reliable despite the unconstitutionally vague instruction on the other aggravating factor, and the use of that instruction was harmless." Id.; see also Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998). Therefore, there was no prejudice from trial counsel's failure to object to these instructions.[22]

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

Petitioner contends that when Petitioner was placed in a videotaped lineup on May 26, 1987, he was in jail awaiting

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[22]Trial counsel lodged a general objection to the instructions, T.Tr. at 1031; whether this was sufficient to preserve any issues for appeal is an issue that need not be decided because the issue was never pursued on appeal.

trial on an unrelated robbery charge. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. Petitioner presented the Missouri courts with several arguments regarding the various lineups administered in this case, but he never raised this challenge.[23] Accordingly, the claim is procedurally defaulted.[24]

V. Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson

Petitioner contends his trial attorney was ineffective for failing to impeach Detective Gibson with evidence that he had committed "improper actions" in prior cases. Petitioner never presented this argument to any Missouri court, so the claim has been defaulted.[25]

W. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized

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[23]In his Second Amended 29.15 Motion, Petitioner challenged a different lineup on these grounds. L.F. at 32. Thus, even if the Missouri Supreme Court "should have" considered the Second Amended 29.15 Motion, this claim would still have been defaulted.

[24]In addition, the claim lacks merit. See Part IV.Z, infra (discussing Moore v. Illinois 434 U.S. 220 (1977)).

[25]This claim also was not included in the Second Amended 29.15 Motion. See footnote 16, supra.

peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause. None of these arguments were raised on appeal to the Missouri Supreme Court, so they have been defaulted.

In addition, the Court notes that Petitioner's first claim is barred by Teague. The use of strikes in this manner is not barred by Batson v. Kentucky, 476 U.S. 79 (1986), and Petitioner would require a new constitutional rule in order to demonstrate that he was prejudiced by the failure to object. The Court cannot find prejudice absent a rule prohibiting the prosecutor's use of strikes for these reasons, and it cannot create the rule in light of Teague.

X. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument During Penalty Phase

Petitioner argues that various aspects of the prosecutor's penalty phase closing argument were improper, and his trial counsel was ineffective for failing to object. Petitioner failed to raise this argument in state court with sufficient specificity to permit review. White III, 939 S.W.2d at 902. Petitioner's failure to satisfy the state pleading rule constitutes a procedural default.

Y. Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

During cross-examination, Petitioner's trial counsel asked Detective Gibson whether he read Petitioner his rights prior to interviewing him. He also established that Petitioner

was willing to talk with Detective Gibson and did not ask for a lawyer. T.Tr. at 775-76. On redirect, the prosecutor asked whether Detective Gibson had asked Petitioner to sign a waiver of his Miranda rights; Detective Gibson said that he had. T.Tr. at 784. Petitioner's trial counsel then approached the bench to object; after the trial court forced him to assert a ground for his objection, he declared "it's irrelevant, it's immaterial, and the fact he signed a consent form has nothing to do with it because he talked to them." T.Tr. at 785. This objection was overruled. Upon resumption of the redirect examination, Detective Gibson reaffirmed that he had asked Petitioner to sign a waiver form and he refused to do so. T.Tr. at 786.

Petitioner contends his appellate counsel was ineffective for failing to challenge this testimony on the grounds that it constituted an infringement on Petitioner's constitutional right to remain silent. The problem with this argument is that trial counsel did not make a constitutional objection; he objected on the basis of relevance. The issue Petitioner claims his appellate counsel should have raised was not preserved at trial and would have been reviewed only for plain error if raised on appeal. As stated in Part IV.F, supra, "[a]bsent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe, No. 974078, slip op. at 4 (quotations omitted). "The decision to forgo a plain error claim is usually the result of a reasonable winnowing of weaker appellate claims. Therefore, we rarely conclude that an appellate attorney's performance was constitutionally deficient for not raising such a claim." Id. There is no "contrary evidence" present in this case.[26]

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[26]Moreover, the Court doubts that the testimony was a comment on Petitioner's right to remain silent, given that he clearly surrendered that right when he agreed to talk to Detective Gibson. In fact, trial counsel conceded as much. T.Tr.

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

During his direct examination, Black testified that he was shown approximately four videotape lineups in September 1987; he was unable to positively identify anyone in those lineups. T.Tr. at 880. On the Saturday before trial, he was shown two videotapes, T.Tr. at 880-81, and was prepared to testify that one of the men was (or at least appeared to be) the man who slashed Wright's throat. The tape in question had been shown to Black in September 1987. T.Tr. at 883, 892-93. On the Monday the trial started, prosecutors spoke with trial counsel and told him that Black had identified Petitioner as the man who entered with Buckner. Trial counsel misunderstood the prosecutor and thought he meant that Black had positively identified Ford (who was also in the lineup). T.Tr. 881-82, 884. Ultimately, the trial court overruled an objection based on the timeliness of the prosecutor's disclosure - the only objection made at trial on this matter. T.Tr. at 884-86.

Petitioner now contends that his appellate counsel was ineffective for failing to challenge Black's identification. However, he does not contend that his appellate counsel should have raised an issue about the timeliness of the disclosure. Instead, he claims his appellate counsel should have argued that the video was unduly suggestive based on its contents and Black's "repeated exposure" to it. He also argues that appellate counsel should have raised a claim based on the fact that trial counsel was not permitted to be at the private screening held by

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at 784. Petitioner insinuates that the questions were designed to comment on his decision not to testify at trial, but the Court does not believe this is a fair interpretation of the record.

the prosecutor None of these objections were made at trial and would have only been reviewed for plain error, so appellate counsel could reasonably refrain from raising them. Roe, No. 97-4078, slip op. at 4.

The Court also doubts these claims had serious merit. Black's viewings occurred approximately 16 months apart - hardly the repetitious showing Petitioner insinuates occurred. Petitioner contends that the lineup was suggestive because Petitioner was one of two people with beards and the only one in a "blue jail shirt" - but there is nothing in the record to support this purely factual assertion (primarily because he never asked the state courts to rule on the issue). Finally, the Supreme Court has held that "a pretrial corporeal identification conducted after a suspect has been indicted is a critical stage in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel." Moore v. Illinois, 434 U.S. 220, 224 (1977). However, this right was not implicated here because Black was shown a videotaped array.

> In United States v. Ash, 413 U.S. 300, (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a corporeal identification, is not a 'trial-like adversary confrontation' between an accused and agents of the government; hence, 'no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.' Id. at 317.

Id. at 227. The lack of merit associated with these claims further substantiates the presumptive reasonableness of appellate counsel's decision not to seek plain error review.

AA. Actual Innocence

In contrast to his earlier argument - where Petitioner asserted his actual innocence solely in an attempt to excuse his procedural defaults - Petitioner now presents his actual innocence as a substantive ground entitling him to relief. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so only as a supplement to a constitutional claim - not as an independent claim. Id. at 404. This distinction was emphasized in Schlup, a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as later announced in Schlup). 513 U.S. at 315-17. The Court went on to explain the different standards as follows:

> If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, [petitioner's] threshold showing of innocence would justify a review of the merits of the constitutional claims.

Schlup, 513 U.S. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera completely bars free-standing claims based on actual innocence or whether, in light of Schlup, it merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 1995. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if the new facts "'unquestionably establish [the petitioner's] innocence.'" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 S.Ct. at 317). Later, in Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996), the Eighth Circuit was again presented with a free-standing claim of actual innocence and, for that reason, explicitly declared that "reliance on Schlup is misplaced." 99 F.3d at 283. Instead, the Meadows Court relied on Herrera to hold that the "claim of innocence based on newly discovered evidence is not cognizable on habeas review." Id. Finally, in Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997); the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" standard. 119 F.3d at 1334.

Resolution of Petitioner's claim is easy if the claim is not cognizable: if it is not cognizable, no relief can be granted. However, because the law in this circuit is not clear, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too is an easy matter: having failed to satisfy the lesser Schlup standard, Petitioner cannot satisfy the higher standard described in Cornell and Allen.

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

Petitioner claims that, while the jury was deliberating, the prosecutor offered to permit Petitioner to plead to second degree murder and receive a sentence of fifteen years. He claims that his trial counsel failed to discuss the plea offer with him, thereby failing to provide effective assistance. This claim was never raised in the state courts and has been procedurally defaulted.[27]

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

On February 3 - the Friday of the first week of trial - Petitioner's lead trial counsel was not present at the start of the day's proceedings. The jury was not given any reason for his absence. T.Tr. at 707. The record does not reflect that he ever appeared at trial that day, and there is no indication he said anything on the record. The record does not reflect a reason for Duncan's absence; Petitioner offers an explanation, but the reason does not appear in the record.

Petitioner argues that lead trial counsel's absence constituted ineffective assistance of counsel. Petitioner did not raise this argument in his pro se 29.15 Motion or his First Amended 29.15 Motion (which explains why the reason for counsel's absence does not appear in the record)[28]

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[27]This claim was not raised in Petitioner's Second Amended 29.15 Motion. See footnote 16, supra.

[28]In addition, Petitioner failed to raise this argument in his Second Amended 29.15 Motion. See footnote ___, supra.

and so the claim has been defaulted.[29]

DD. Judicial Bias During Postconviction Proceedings, Part I

Petitioner contends that the trial judge in his second 29.15 was biased against him. He bases this claim on the fact that the judge had an ex parte communication with the prosecutor about the scope of the Missouri Supreme Court's remand.

Respondent contends that this claim is not cognizable because it occurred during a postconviction proceeding. The Court is not convinced Respondent is correct, particularly in light of the absence of authority to support this proposition. Inherent in the concept that federal courts will defer to the findings rendered in a state postconviction proceeding is the understanding that those findings were rendered by an unbiased tribunal.

Petitioner's claim is easily disposed of on the merits. As succinctly explained by the Missouri Supreme Court:

> The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.1 5 motion are still before this Court. This is true, but that judgment was rendered on

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[29]Moreover, to the extent Petitioner contends he was prejudiced simply because O'Connor conducted proceedings that day, Petitioner must independently demonstrate that O'Connor's performance fell short of the Sixth Amendment's requirements.

> August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge to disqualify because of a conversation that is to occur more than one year in the future.

White III, 939 S.W.2d at 903. Assuming the claim is cognizable, it lacks merit.

EE. Judicial Bias During Trial

Petitioner has identified six incidents during trial that purportedly demonstrate that the trial judge was biased in favor of the prosecution. Petitioner did not raise this argument on direct appeal, so the claim has been defaulted.

FF. Judicial Bias During Postconviction Proceedings, Part II

Petitioner contends that the trial judge in his 29.15 proceeding demonstrated bias when he adopted the prosecution's findings of fact and conclusions of law verbatim. As stated earlier, the Court does not accept Respondent's argument that this claim is not cognizable. See Part IV.DD, supra.[30] However, as before, the merits are not in Petitioner's favor. The Court does not believe that the trial judge's actions demonstrate bias on the part of the judge. Moreover, the events

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[30]The Court believes this claim has been procedurally defaulted, but Respondent has not raised this argument. At present, the law is unclear as to whether the Court can raise the issue *sua sponte*. See Trest v. Cain, 118 S. Ct. 478, 480 (1997). If it were clearly permissible to do so, the Court would raise the issue on its own and hold that the claim has been defaulted.

occurred in connection with Petitioner's first 29.15 proceedings, the results of which were completely reversed by White I. Therefore, even if the judge's use of the prosecutor's proposed findings of fact demonstrated bias, any prejudice was eliminated.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

During small-group voir dire, one of the jurors related an event that occurred when he had served on a jury previously. He explained that following the verdict one of the lawyers told him that some of the State's witnesses had lied. He did not recall whether it was a prosecutor or defense attorney. T.Tr. at 417-18. A lengthy discussion (out of the jury's hearing) about the possibility that these comments poisoned the small group ensued. The trial judge struck three of the five potential jurors for cause, T.Tr. at 444, leaving only Venirepersons Benedict (# 87) and Ford (# 89). Benedict and Ford were returned for additional voir dire, T.Tr. at 454, and the prosecutor was permitted to explain that the incident "was an example of a defense attorney being a bad loser" and "that it certainly wasn't the prosecutor that said a witness lied, and that.., in fact wasn't the case." T.Tr. at 455. Petitioner contends that his trial counsel provided ineffective assistance in failing to object to these statements.

This argument was not raised on appeal and has been procedurally defaulted. In addition, the Court concludes it is impossible for Petitioner to demonstrate prejudice. After excluding those jurors who were struck for cause, peremptory strikes for the main panel were made against jurors with numbers under # 79. T.Tr. at 495-96. Benedict and Ford were candidates to be the second alternate, T.Tr. at 496, but both were struck peremptorily. T.Tr. at 499 (identifying jurors and

alternates).

It is true that at the time of Petitioner's trial, Missouri law provided "that criminal defendants are entitled to a 'full panel of qualified jurors before being required to make peremptory challenges' and that failure to sustain a meritorious challenge for cause is prejudicial error." Sloan, 54 F.3d at 1387 (quoting State v. Wacaser, 794 S.W.2d 190, 193 (Mo. 1990) (en banc)).[31] However, Petitioner cannot argue that his use of a peremptory challenge on either Benedict or Ford[32] constitutes prejudice under Strickland because none of the alternates were called upon to deliberate. T.Tr. at 1027-29 (jurors identified when polled at the end of the case). Thus, Petitioner was not prejudiced by the prosecutor's comments and the resulting "need" to use a peremptory to eliminate Benedict or Ford as a potential alternate.

HH. Ineffective Assistance of Postconviction Counsel, Part II

Petitioner again argues that he was deprived of his Sixth Amendment right to counsel in the postconviction proceedings. The argument is rejected. See Part II.B, supra.

II. Ineffective Assistance of Appellate Counsel: Failure to

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[31]Wacaser was legislatively overruled, but not until well after Petitioner's trial. Thus, at the time of his trial, Petitioner was entitled to a fully qualified, untainted jury upon which to exercise his peremptory strikes.

[32]Both were candidates to be the second alternate, and neither was chosen. Thus, it can be deduced that the prosecutor used his peremptory on either Benedict or Ford and Petitioner used one on the other.

Raise Enumerated Claims

Within this argument, Petitioner claims his appellate counsel should have raised the following grounds: "verdict directing instructional error, Brady violation by the state, challenges to the prosecution's guilt phase and penalty phase closing arguments." Some of these claims are discussed in greater detail elsewhere in this order. The argument regarding the verdict director lacks merit, Part IV.LL, infra, so his claim of ineffective assistance of counsel must be rejected as well. Similarly, his Brady claim lacks merit, Part IV.KK, infra, so there could be no ineffectiveness in failing to raise the issue on appeal. Finally, Petitioner has not provided sufficient detail about the remaining portions of this claim to permit meaningful discussion (and, in any event, the Court notes that any appeal would have sought only plain error review).

JJ. Ineffectiveness of Trial Counsel: Failure to Request Mistrial During Prosecutor's Closing Argument

During his closing argument following the trial's guilt phase, the prosecutor told the jury that "if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -" Supp. T.Tr. at 30.[33] Petitioner's trial counsel objected, and the trial court sustained the objection and instructed the jury to disregard the prosecutor's comment. Supp. T.Tr. at 32-33. Prior to the delivery of the cautionary instruction to the jury, Petitioner's trial counsel moved for a mistrial but also stated that "as a practical matter I don't want a mistrial." Supp. T.Tr. at 31-32. After the objection was sustained in open

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[33]This is a reference to the Supplemental Trial Transcript, which contains the prosecutor's closing argument.

court, trial counsel approached the bench again and moved for a mistrial, and the motion was denied. Supp. T.Tr. at 33.

On direct appeal, Petitioner challenged the trial court's denial of the motion for mistrial. After recounting the circumstances described above, the Missouri Supreme Court held that "[u]nder these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief." White I, 813 S.W.2d at 866.

Petitioner does not challenge the denial of the mistrial; instead, he argues that his trial counsel's actions constituted ineffective assistance. This argument was not presented in Petitioner's pro se 29.15 Motion, First Amended 29.15 Motion or on appeal, and has been procedurally defaulted.[34]

KK. Ineffective Assistance of Appellate Counsel: Failure to Raise Claim Based on *Brady v. Maryland*

Relying on the assumption that Kinney and Black were shown photographs of White but did not identify him as one of the perpetrators, Petitioner contends his trial counsel should have raised a claim based on Brady v. Maryland, 373 U.S. 83 (1963). Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The obligation to produce extends to material impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

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[34]The issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

Petitioner did not raise this issue in his Motion for New Trial, so on appeal the claim would have been reviewed only for plain error. As stated earlier, the failure to raise a Claim that will be reviewed for plain error is presumptively reasonable. Roe, No. 97-4078, slip op. at 4. There is no basis for overcoming this presumption because there is no indication that the factual predicate to this claim is true: neither Kinney nor Black testified that they were shown Petitioner's photograph prior to the occasions upon which they positively identified him. T.Tr. at 649-51, 662-63, 951.[35]

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

Petitioner contends that Instruction 5 violated his due process rights because it improperly permitted the jury to convict him without finding all the elements of the crime. Instruction 5 incorporated accomplice liability theories and, in pertinent part, instructed the jury that if it found

from the evidence beyond a reasonable doubt:

> First, that on January 6, 1987, in the County of Jackson, State of Missouri, the defendant or another person or persons caused the death of Don Wright by asphyxiating, stabbing and cutting him, and

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[35]Petitioner's suggestion that Respondent conceded the merits of this claim before the Missouri Supreme Court is incorrect. Respondent's Brief before the Missouri Supreme Court at 34-35.

Second, that defendant or the other person or persons knew that his conduct was practically certain to cause the death of Don Wright, and

Third, that defendant or the other person or persons did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief,

then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the death of Don Wright, the defendant aided or encouraged another person or persons in causing the death of Don Wright and reflected upon this matter cooly [sic] and fully,

then you will find the defendant guilty of murder in the first degree.

Second Supplemental Legal File at 15-16.

In State v. Ferguson, 887 S.W.2d 585 (Mo. 1994) (en banc), the Missouri Supreme Court held that although a first degree murder conviction could be based on accomplice

liability, the element of deliberation -- which distinguishes first degree murder from second degree murder -- must be attributed to the defendant. Ferguson explained that

> [u]nder State v. Ervin, 835 S.W.2d 905, 923 (Mo. banc 1992) [cert. denied, 507 U.S. 954 (1993)], and State v. O'Brien, 857 S.W.2d 212, 217 (Mo. banc 1993), the verdict directing instruction for first degree murder must ascribe the element of deliberation to the defendant specifically, even though the charge is premised on accessory liability. Although the conduct of a defendant may be imputed to a codefendant, the element of deliberation may not. O'Brien, 857 S.W.2d at 218. The rationale for this rule, though not expressly stated in Ervin or O'Brien, is that the failure to ascribe deliberation to the defendant relieves the State of its burden of proving the requisite mental state of the offense. An instruction that relieves this burden violates due process and constitutes error.

Ferguson, 887 S.W.2d at 587. It is clear that Instruction 5 does not violate Ferguson's commands. Instruction 5 establish a two-step process: in the first three elements, the jury was asked to determine whether a first degree murder had been committed but was not asked to assess criminal responsibility for that murder. Upon determining that a first degree murder had been committed, the jury was then required to consider the fourth element -- which was designed to determine if Petitioner could be held criminally responsible for the first degree murder described in elements one through three. Element four clearly requires the jury to determine whether the Petitioner acted with the requisite deliberation; accordingly, Ferguson's commands were satisfied. In addition, the Eighth Circuit has affirmed a

substantially similar instruction. Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998). There being no error, Petitioner was not prejudiced when his appellate counsel failed to raise this issue on appeal.

MM. Ineffective Assistance of Postconviction Counsel, Part III

In this claim, Petitioner asserts more instances of ineffective assistance of postconviction counsel. These claims are denied. See Part IV.B, supra.

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

Petitioner contends that O'Connor was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to jury selection, Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5.

Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of trial counsel. Petitioner did not raise this issue in the state courts, so the claim has been defaulted and this Court cannot consider Petitioner's accusation that O'Connor reviewed his file when he was a prosecutor.

OO. Ineffective Assistance of Trial Counsel: Failure to

Object to Prosecutor's Opening Statement

During his opening statement, the prosecutor told the jury "Roger Buckner, this defendant Leamon White and Cleveland Ford entered into a conspiracy to rob Don Wright of that crack and entered further into a conspiracy to leave no witnesses to that robbery, to kill everyone present." T.Tr. at 505. The prosecutor also described Petitioner's efforts to hide Buckner after the crime as part of a "conspiracy." Petitioner contends that his trial counsel was ineffective for not objecting to these statements because there was no evidence supporting these claims. The Court disagrees. As the Missouri Supreme Court found, "[r]eview of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's iheory of the case." White III, 939 S.W.2d at 902.

PP. Proportionality Review

Petitioner contends the Missouri Supreme Court failed to properly perform the proportionality review required by Mo. Rev. Stat. § 565.035. The fatal flaw in Petitioner's argument is that "[t]he federal Constitution of its own force, of course, requires no such review." Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994), cert. denied, 515 U.S. 1136 (1995)(citing Pulley v. Harris, 465 U.S. 37 (1984)). Here, the Missouri Supreme Court conducted the review required by state law, and a federal court cannot re-examine the issue or otherwise look behind the factors actually considered by the Missouri Supreme Court. This Court cannot "consider whether the [state] court misinterpreted the state statute. . . " Sweet v. Delo, 125 F.3d

1144, 1159 (8th Cir.), cert. denied, 118 S. Ct. 1144 (1997). Moreover, a federal court cannot "look behind [the state court's proportionality] conclusion to consider the manner in which the court conducted its review . . . ." Six v. Delo, 94 F.3d 469, 478 (8th Cir. 1996), cert. denied, 117 S. Ct. 2418 (1997) (quoted with approval in Sweet, 125 F.3d at 1159).

OO. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck. The Missouri Supreme Court rejected this claim because Petitioner failed to allege how he had been prejudiced, White III, 939 S.W.2d at 900, and his failure to satisfy the state's pleading requirements constitutes a procedural default.

The Court also notes that the record belies Petitioner's factual assertions. The venireperson in question, Cassandra Hughes, was number 60 on the panel. She was questioned during small-group voir dire, T.Tr. at 352-53, and neither party asked that she be struck for cause. T.Tr. at 353-54. She was not listed among those whom the parties agreed to strike for cause. T.Tr. at 493-94 (discussion of panelists the parties mutually agreed to excuse). Her number was low enough to include her as a potential juror. T.Tr. at 496. While the attorneys were considering their peremptory strikes, Hughes reported that she had the flu and the trial court asked the parties to confirm their agreement that she could be sent home immediately. Although the parties agreed with the factual statement that she could be excused, they did not agree that she would be struck for cause. Specifically, the prosecutor declared "[f]or now I think all we need to do is say that she's going to be excused because the defendant may end up striking her as one of their peremptories

. . . ." T.Tr. at 498. The discussion then turned to the subject of the alternate jurors The prosecutor never agreed that Hughes could be excused for cause; instead, the participants were simply acknowledging defense counsel's intent to strike Hughes, thereby permitting Hughes to leave immediately instead of waiting in the jury room, sick with the flu, until she was later formally dismissed. None of Petitioner's peremptory strikes were "wasted."

RR. Right to Be Present at Critical Stages

Following his conviction, on March 2, 1989 Petitioner filed a Supplemental Motion for New Trial alleging that one of the jurors (Timothy Williams) "failed to reveal on voir dire examination. . . that his brother or other relative was a friend of and had gone to school with the victim, Don Wright." Direct Appeal Legal File at 39. A hearing was held on March 1, 1989,[36] but Petitioner did not attend the proceeding. The record contains no reason for his absence. The Motion (along with other post-trial motions) was denied on April 14, 1989.

Petitioner did not raise this issue in his initial appeal. He raised the issue for the first time in his brief in the third appeal to the Missouri Supreme Court. Keeping in mind that Petitioner's direct appeal was disposed of in White I, the court observed that "[p]lain error review may be considered 'on appeal.' Rule 84.13(c). This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-

[36]There is no explanation as to how the motion was filed the day after the hearing; however, there is no denying the dates as they appear in the legal file and on the Transcript.

conviction court 'clearly erred' in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible." White III, 939 S.W.2d at 904.[37] Consequently, the claim has been procedurally defaulted.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. Petitioner failed to satisfy the state court's pleading requirements for proper presentation of the first four claims, see White III, 939 S.W.2d at 895-97, so they have been defaulted. As to the latter claim, the Missouri Supreme Court affirmed the trial court's finding that "counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before

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[37]The Missouri Supreme Court also "assume[d] that the issue is raised as a motion to recall the mandate" and considered whether appellate counsel provided ineffective assistance for failing to raise the issue. White III, 939 S.W.2d at 904. Petitioner has not raised this issue in this forum, so there is no need to address it.

and at trial. At most, therefore, Black's response to counsel's questions was cumulative." White III, 939 S.W.2d at 898. This finding is supported in the record and is entitled to deference. E.g., Pryor, 103 F.3d at 712-13. In light of this finding, Petitioner cannot satisfy either of Strickland's prongs.

TT. Conflict of Interest, Etc.

In an argument very similar to the one presented in Part IV.L, supra, Petitioner contends that his attorney "was ineffective and had a conflict of interest" as demonstrated by his asking Petitioner to endorse strategic decisions in open court. These same actions are also faulted because they "disclosed privileged attorney-client communications and strategy decisions to the prosecutor and Court prior to and during trial." The Court's holding in Part IV.L applies here: these claims were not raised in the state courts and lack merit even if they had not been procedurally defaulted.

UU. Restriction on Cross Examination of Kinney

During trial, Petitioner's attorney attempted to impeach Kinney with police reports of her statements. The reports were not written by Kinney. The trial court disallowed the attempt because it was improper impeachment; they were not Kinney's statements, but rather the officers' statements. Counsel also tried to impeach Kinney with her deposition when she testified she could not remember certain facts. This attempt was also thwarted, given that the deposition did not contradict her trial testimony. Petitioner contends that these evidentiary rulings violated his rights under the Sixth and Fourteenth Amendments.

Ordinarily, an evidentiary question is not reviewable in a habeas proceeding because it involves issues of state, not federal, law. See 28 U.S.C. § 2254(a) (writ of habeas corpus

may be granted if person "in custody in violation of the Constitution Or laws or treaties of the United States."). An evidentiary claim is cognizable if it infringes upon a specific constitutional right, e.g., Clark v. Groose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994), but no specific constitutional right is implicated by the trial court's rulings. The Constitution's guarantees of a fair trial and due process do not alter this conclusion; such a ruling would "constitutionalize" every evidentiary decision made. Petitioner's argument is not cognizable.

VV. Cumulative Error of Trial Counsel

Petitioner contends that the cumulative effect of his trial counsel's actions constitutes an independent basis for relief. The Eighth Circuit has specifically held that claims of ineffective assistance cannot be considered cumulatively; each claim of ineffective assistance of counsel must rise or fall on its own merits. E.g., Pryor, 103 F.3d at 714 n.6; United States. v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994).

WW. Cumulative Error (Generally)

In an argument related to Part IV.W, supra, Petitioner contends that the cumulative effect of all the constitutional errors entitles him to relief. The Eighth Circuit has held that "cumulative error is not grounds for federal habeas relief as each habeas claim must stand or fall on its own." McDowell v. Leapley, 984 F.2d 232, 235 (8th Cir. 1993) (quotation omitted).

V. CONCLUSION

For the foregoing reasons, Petitioner's application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

DATE 12/4/98

/s/Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 97-1663-CV-W-3
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DIRECTING PARTIES TO SUBMIT SUPPLEMENTAL BRIEFING

On December 4, 1998, the undersigned denied Petitioner's application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The order observed that "the issue of procedural default predominates over the substantive claims asserted by Petitioner," slip op. at 6, and started its legal analysis by considering the four arguments Petitioner presented as grounds for overcoming the procedural bar: (a) actual innocence, (b) ineffective assistance of postconviction counsel, (c) abandonment by postconviction counsel, and (d) adequacy of state grounds. The Court concluded there was no basis for overcoming the procedural bar. The Court then considered and rejected the merits of Petitioner's non-defaulted claims.

On appeal, the Eighth Circuit held "that the state procedural rule that barred Mr. White's second amended [Rule 29.15] motion was inadequate to bar federal consideration of these claims." White v. Bowersox, No. 99-1660WM, slip op. at 2 (8th Cir. Mar. 14, 2000). The Court of Appeals also affirmed

the rejection of three of Petitioner's claims on the merits. The case was remanded "for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits." Id. at 11. The mandate was issued on April 28, 2000.

The Court of Appeals specifically refrained from considering the applicability of the "actual innocence" exception to the procedural bar. Id., slip op at 6 n.4. This appears significant because the undersigned originally observed that a number of Petitioner's defaulted claims had not been raised in the second amended Rule 29.15 motion; thus, those claims appeared to be defaulted even if the claims raised in the second amended Rule 29.15 motion could be considered (as will happen now in light of the Eighth Circuit's decision). In other words, even though claims contained in the second amended Rule 29.15 motion can now be considered, not all of the claims previously adjudged to be defaulted were contained in the second amended motion.

The Court is presently of the view that the appropriate approach on remand is to re-examine each of Petitioner's claims. If the claim was disposed of on grounds unrelated to the omission from the second amended petition, then the Court will adhere to its prior decision. Similarly, if the claim was held to be defaulted and was not included in the second amended motion, then the Court will adhere to its prior decision. If the claim was originally held to be defaulted but was included in the second amended motion, then the Court will reconsider the claim in its entirety.

This is the Court's preliminary view and is offered to guide the parties in their post-remand efforts. Before the Court makes a final determination on this matter- and before it takes up the issues to be considered on remand - the parties shall file

1. Which of Petitioner's claims are to be considered on remand (and why)?

2. How should those claims be disposed of?

Petitioner shall file its suggestions on or before June 2, 2000. Respondent shall respond to those suggestions on or before June 30, 2000, and Petitioner shall have until July 21, 2000.

IT IS SO ORDERED.

DATE

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1660WMKC

Leamon White,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and for
	*	Rehearing en banc
	*	
Michael S. Bowersox,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

April 21, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	FILED
	)	JUL 23, 1991
Respondent,	)	
	)	
vs.	)	No. 71600
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

The Honorable David W. Shinn, Judge

Defendant White directly appeals his jury conviction of first degree murder, three counts of armed criminal action, and two counts of first degree assault. He also moved for postconviction relief under *Rule 29.15* and now appeals from the motion court's denial of relief on procedural grounds. These two appeals were consolidated for review pursuant to *Mo. Const. 1945, Art. V, Section 3* and *Rule 29.15(l)*.

Defendant does not challenge the sufficiency of the convicting evidence, but a brief rendition of the facts follows. Defendant went with his friend Roger Buckner to the home of victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.

The purpose of defendant's visit was to obtain some

"crack" cocaine. Wright had previously promised to get the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

Rule 29.15 Proceedings

After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion

for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Movant argues that this case should be remanded to the motion court for findings on the issue of postconviction counsel's abandonment in light of this Court's recent decisions in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991). We agree.

Rule 29.15(f) provides:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. . .

This Court has held that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance. *See Schneider v. State*, 787 S.W.2d 718, 720 (Mo. banc), *cert. denied* 111 S.Ct. 231 (1990) (applying the stated rule prospectively). In this case the motion court appointed counsel, and the thirty day limitation began to run, on September 25, 1989. Movant's first counsel obtained the allowed thirty day extension on October 20, 1989 and then withdrew from the case on November 9, 1989. Movant's second postconviction counsel entered his appearance on November 9, 1989, but failed to file an amended motion until

November 27, 1989. *Rule 29.15(e)* specifically states:

> For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed.

Neither of movant's attorneys obtained the motion court's permission for the change of counsel.[1]

The first attorney's withdrawal without permission from the motion court could constitute abandonment which arguably prejudiced movant. This issue of abandonment should be the subject of a factual inquiry by the motion court, by conducting an evidentiary hearing, or by examining the existing record if no disputed facts appear.

Movant argues that his second counsel also effectively abandoned him by failing to file a timely and complete amended motion. He argues that the amended motions were not properly verified and do not allege sufficient facts and grounds as required by *Rule 29.15(e)*. This failure to verify and properly amend the claims raises questions as to whether the defendant was essentially abandoned by his postconviction counsel. These issues should also be adjudicated in a factual hearing conducted by the motion court under the teaching of *Sanders*, 807 S.W.2d at 495.

Counsels' withdrawal, failure to file a timely amended motion, and allege sufficient facts raise serious questions as to whether the movant received postconviction representation in

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[1]We express no opinion as to what impact, if any, a withdrawal permitted by the motion court would have on the time limitations contained in *Rule 29.15*.

the sense of *Rule 29.15*. Answers to these questions are for the motion court as part of movant's *Rule 29.15* proceedings. *Sanders v. State*, 807 S.W.2d at 495.

Direct Appeal

In the interest of expedition, we also address defendant's direct appeal claims and find them to be without merit.

Defendant presents five primary claims of error in his direct appeal. First, defendant alleges the trial court erred in refusing to order a new trial after the court informed the jury during voir dire that the two possible sentences for first degree murder included the death penalty or life imprisonment without probation or parole, unless the governor exercised his executive clemency powers. Defendant claims this statement "served to dilute and restrict the [jurors'] sense of responsibility," and is therefore constitutionally prohibited under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

First, it must be noted that defendant's counsel did not object to these comments at the time they were made, and our review is necessarily limited to plain error. *Rule 30.20; State v. McMillin*, 783 S.W.2d 82, 95 (Mo. banc), *cert denied* 111 S.Ct. 225 (1990). We find no plain error resulting from the trial court's correct statements of the law. The Supreme Court addressed this question in *California v. Ramos*, 463 U.S. 992 (1983), and held that an instruction allowing the jury to consider the governor's powers did not impermissibly restrict the jurors' role in sentencing. Accordingly, this court held in *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991), that no error results where the statements were correct statements of existing law. *Id.* at 9 (citing *Dugger v. Adams*, 489 U.S. 401 (1989)). The trial court's statements about punishment accurately reflect Missouri law on the possible punishments for first degree

murder. *See § 565.020.1.* Defendant's first point is denied.

Defendant's second point alleges that the trial court erred by impermissibly restricting the defense counsel's cross-examination of the state's chief witness, Carol Kinney. Defense counsel confronted Ms. Kinney with prior inconsistent statements made to the police and other witnesses in an effort to impeach her direct examination testimony. Defendant accurately points out that this Court set a liberal standard for impeachment of witnesses in *State v. Bowman*, 741 S.W.2d 10 (Mo. banc 1987), *cert. denied* 488 U.S. 829 (1988). But the use of prior inconsistent statements is not absolute. In *State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987), we held "impeachment may be made only where the witness has been asked the specific question upon which [she] is sought to be discredited." *Id.* at 337 (citations omitted). The scope of cross examination is soundly within the trial court's discretion. This contention is well-supported by Missouri cases both from this Court and the courts of appeals.[2] The trial court's decision was not an abuse of discretion. The second point is also denied.

Third, defendant claims the trial court erred in sustaining the prosecutor's challenge of venire members Robertson and Bryson for cause on account of their opinions about imposing the death penalty. Again, this matter rests within the discretion of the trial court, and we find no reason to disturb that court's ruling. This Court in *State v. McMillin*, 783 S.W.2D at 91, reiterated the proper standard for striking venire members based on their views regarding the death penalty. The record must show for each venire member struck that the

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[2]*See, e.g., State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987); *State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984); *State v. Laux*, 755 S.W.2d 315 (Mo. App. 1988); and *State v. Dunn*, 731 S.W.2d 297 (Mo.App. 1987).

"views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] oath.'" *Id.* at 91, *quoting Wainwright v. Witt*, 469 U.S. 412, 420 (1985).

Venireperson Robertson clearly stated that as a member of the jury he would be incapable of considering death as one of the possible penalties. Defense counsel made no attempt to rehabilitate this venire member, although he did object "just for the record." Similarly, Venireperson Bryson stated that she was opposed to the death penalty. Upon defense counsel's questioning she stated that she could at least consider the death sentence, but would not vote in favor of imposing it. This Court defers to the trial judge's superior position to determine the impact of the venire member's statements and demeanor. The record supports the trial judge's conclusion that these jurors could not give appropriate consideration to the death penalty.

Defendant next argues the trial court erred by refusing defense counsel's motion for a mistrial based on statements made in the prosecutor's closing argument. The prosecutor stated:

> Because if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -- . . .

Defendant's attorney immediately objected to this statement and requested the court to give the jury instructions to disregard the statement and follow the written instructions as given by the court. The trial court sustained the objection and gave the cautionary instruction defendant requested. Defense counsel then moved for a mistrial "to protect the record," but stated he did not want a mistrial "as a practical matter." The trial court

denied the mistrial motion.

Under these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. *See State v. Laws*, 668 S.W.2D 234, 238 (Mo.App. 1984). The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief.

Finally, defendant invokes this court's mandatory proportionality review under *§ 565.035, RSMo* 1986, and argues that the death sentence in this case is excessive and disproportionate when compared to similar cases. We reject this contention and further find no indication that the sentence was imposed of passion, prejudice or any other arbitrary factor.

Disregarding those cases in which the state waived the death penalty as a possible sentence,[3] this defendant's death penalty is apparently commensurate with other similar cases in which the ultimate penalty has been imposed. We find cases similar to this one in which the jury recommended the death penalty. In *State v. Grubbs*, 724 S.W.2D 494 (Mo. banc 1987), a defendant was sentenced to death for tying up a victim, cutting his throat, and attempting to burn down the victim's trailer where the crime occurred. Similarly, in *State v. McMillin*, 783 S.W.2D 82 (Mo. banc 1990), this Court upheld a death sentence for a defendant who gagged, beat and set on fire a victim from whom the defendant had expected to obtain illegal drugs. Other cases with somewhat similar facts may not have resulted in the imposition of the death penalty, but this circumstance does not require the mitigation of this death

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[3]The Court has held that such cases are not appropriately considered for proportionality review purposes. *See State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984).

sentence. The proper inquiry in determining proportionality is "not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole. *See* § 565.035.3(3)." *State v. Mallett*, 732 S.W.2D 527, 542 (Mo. banc 1987). On the basis of prior cases, we find this defendant's sentence comports with similar cases in which other defendants received the death penalty. Defendant claims that his death sentence is disproportionate because his accomplice received a life sentence for his role in the crimes (*see State v. Buckner*, ___ S.W.2d ___ (Mo. App. 1991), but the state waived the death penalty in that case. The multiple and vicious assaults, in the course of an attempt to obtain money and drugs, demonstrate conduct of the most aggravating sort.

Conclusion

Defendant's conviction and death sentence are affirmed pursuant to *§ 565.035.5 RSMo* 1986. His appeal based on the denial of *Rule 29.15* relief is reversed and remanded to the motion court for further proceedings consistent with *Sanders v. State*, 807 S.W.2D 493 (Mo. banc 1991) and this opinion.

Charles B. Blackmar, Judge

Robertson, C.J., Covington, J., Kennedy, Sp.J., and Higgins, Sr.J., concur; Holstein, J., concurs in separate opinion filed; Rendlen, J., concurs and concurs in separate opinion of Holstein, J.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	FILED
	)	JUL 23, 1991
Respondent,	)	
	)	
vs.	)	No. 71600
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

CONCURRING OPINION

I concur fully in the Court's decision affirming the conviction. However, my concurrence with that portion of the opinion reversing the Rule 29.15 conviction is done with some reservation. I believe there is a serious question whether the appellant has properly preserved, in his point relied on, any claim that there was a violation of Rule 29.15(e). It is not a constitutional violation, but a violation of that rule which justifies a reversal under the opinions in *State v. Luleff* and *State v. Sanders*, cited and relied on in the majority opinion.

The point relied on, upon which the Rule 29.15 judgment is reversed, states as follows:

> The motion court clearly erred in denying appellant's motion for postconviction relief because the record shows that appellant was denied a full and fair hearing on all of his claims due to ineffective assistance of appointed 29.15 motion counsel, in violation of the fifth,

> United States Constitution and article I, sections 10, 18(a), and 29.15 of the Missouri Constitution, in that appointed counsel failed to file a timely amended motion and failed to ascertain if all justiciable allegations of error were included in the amended motion that was filed.

It is noteworthy that no claim is made in the point relied on that counsel or the trial court failed to comply with Rule 29.15(e). In the authorities under the point, no mention is made of Rule 29.15(e). The rules are reasonably clear as to what is required in a point relied on portion of a brief:

> The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder.

Rule 84.04(d). In this particular case, the only violation asserted is a violation of a constitutional right. No claim is made that the rules of this Court were violated.

The United States Supreme Court recently reiterated that there is no constitutional right to counsel in a post-conviction proceeding, and the burden of an error made by an attorney in a collateral proceeding, including failing to meet time constraints under a state procedural rule, falls on the shoulders of the defendant. *Coleman v. Thompson*, 59 U.S.L.W. 4789.

I can think of nothing that is clearer than the language of our rule requiring the preservation of claims:

> Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed *shall not be considered* in any civil appeal . . .

Rule 84.13(a) (emphasis added). The language of that rule must be given at least as much meaning and force as the languate of Rule 29.15(e).

In this case, appellant's brief was filed before the decision in *Luleff* and *Sanders*. Only in the reply brief was Rule 29.15 relied on and *Luleff* and *Sanders* were cited. Because of the peculiar circumstances of this case, I am willing to forgive the shortcomings in appellant's brief. In the future, I will not join in an opinion in which the *Sanders* claim is not properly preserved in a brief that complies with this Court's rules. To require less than compliance with our rules on briefing undermines the integrity of all the rules and leads to confusion among bench, bar and the general public. The rationale behind the rule on briefing is stated in *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978), and need not be amplified here. It is sufficient to say that requiring a party to identify the issues to be decided is not unreasonable, but is essential to our process.

The current vogue in capital cases is to transmute virtually every claim of error into a violation of some provision of the state or federal constitution. The fact is that many, if not most, rights are granted under the grace of a rule, statute or judicial precedent. The right to counsel and counsel's duties in a Rule 29.15 proceeding are guaranteed by the rule, not the Constitution. Failure to properly brief the point is, or at least

should be, a waiver of the claim.

JOHN C. HOLSTEIN, Judge

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	FILED
	)	MARCH 22, 1994
Respondent,	)	
	)	MODIFIED
	)	APRIL 26, 1994
	)	
vs.	)	No. 71600
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

The Honorable Alvin C. Randall, Judge

Defendant was convicted in Jackson County Circuit Court of first degree murder, armed criminal action and first degree assault. Defendant was sentenced to death. His direct appeal and motion for post-conviction relief were consolidated. This Court affirmed the appellant's direct appeal and remanded to the motion court for findings on the issue of post-conviction counsel's abandonment in light of *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). On remand, the motion court dismissed defendant's Rule 29.15 motion because it was not properly verified. In the alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, whereby the court denied defendant's motion on the merits. The motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992, in which it determined that

defendant was not abandoned. This Court holds that: (1) the verification requirement for defendant's pro se 29.15 motion was met when defendant signed the motion; (2) a remand to the motion court in accordance with *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993), is required for findings of fact and conclusions of law on defendant's pro se 29.15 motion; (3) defendant's first and second amended 29.15 motions were verified, but were not timely filed and should have been dismissed; (4) defendant was abandoned by the decision of the Office of State Public Defender to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file an amended motion timely; (5) defendant was not abandoned by counsel for improperly verifying his amended motions or for failure to allege sufficient facts and grounds for relief; (6) defendant's first amended 29.15 motion is revived because defendant was abandoned as to the timeliness of the first amended motion but not as to the motion's content; (7) defendant's second amended 29.15 motion was properly dismissed as untimely filed; and (8) on remand the motion court should make findings of fact and conclusions of law on defendant's first amended motion in accordance with *Barry*, 850 S.W.2d 348.

FACTS

We adopt the statement of facts from our earlier opinion in *State v. White*, 813 S.W.2d 862 (Mo. banc 1991). The brief rendition of the facts in *White* are as follows.

On January 5, 1987, defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Earnest Black,

a guest in the home. The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised to get the cocaine and sell it to White. When defendant and Buckner arrived, they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

RULE 29.15 PROCEEDINGS

After his conviction, defendant filed a timely pro se post-conviction motion on August 17, 1989, which was not notarized. Defendant signed and placed his thumbprint on the pro se motion, stating that a notary public was unavailable. On September 25, 1989, the court appointed the Office of State Public Defender for the Sixteenth Judicial Circuit to represent the defendant on his post-conviction relief motion and granted defendant until October 23, 1989, to file an amended motion.

On October 20, 1989, movant's first attorney entered his appearance and moved for a thirty day extension to file his amended motion. The motion court granted defendant an extension until November 23, 1989; this was the only extension authorized under Rule 29.15(e).

On November 9, 1989, which was fourteen days prior to the last day the amended motion could be filed,[1] the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. On November 23, 1989, which was the filing deadline, neither of defendant's appointed counsel had filed an amended motion. On November 27, 1989, defendant's second appointed counsel filed a first amended motion and a motion for a thirty day extension of time. This first amended motion contained a handwritten verification that defendant had signed on November 14, 1989, which was prior to the drafting of the amended motion. The verification was notarized by defendant's second appointed counsel.

Although the motion court had no jurisdiction to do so under Rule 29.15(e), it granted movant's request for a second extension of time to January 9, 1990, to file another amended motion. Movant's counsel filed the second amended motion on January 8, 1990. The second amended motion also contained

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[1]The sixty days (original thirty days plus one extension of thirty days) within which the defendant's 29.15 motion could be filed actually expired on November 24, 1989 The court, however, set the filing deadline for November 23, 1989. Thus, defendant's second appointed counsel actually could have had fifteen days under Rule 29.15(f) from the date he entered his appearance to file an amended motion. But the first amended motion was untimely filed on November 27, which was eighteen days after the second attorney entered his appearance.

the handwritten verification that appellant had signed on November 14, which was prior to the drafting of either the first or second amended motions. On August 1, 1990, the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing. On appeal from the motion court's findings, this Court remanded to the motion court for a determination of whether post-conviction counsel had abandoned defendant in light of this Court's decision in *Sanders,* 807 S.W.2d 493.

On remand, the motion court found that defendant was not abandoned because his original pro se motion was not properly verified and, therefore, the court dismissed defendant's pro se motion and the first and second amended motions filed by his second attorney. The court concluded that an attorney cannot abandon something that does not exist. In the alternative, the motion court found that: (1) the first attorney's withdrawal without permission of the court did not amount to abandonment because defendant's second attorney had ample time within which to file the first amended motion (sixty days); (2) the late filing of defendant's first amended motion did not amount to abandonment because of the order allowing defendant an extension of time to file his first amended motion; and (3) defendant was not abandoned by the late filing of his second amended motion because it was filed within the extension granted by the court. Finally, in the third alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, overruling defendant's 29.15 motion in the event that this Court determines that it was not proper for the motion court to dismiss defendant's pro se motion and first and second amended motions filed by counsel.

PRO SE MOTION AND VERIFICATION

The State argues that the motion court did not have

jurisdiction to rule on defendant's 29.15 pro se motion because it was not properly verified. Rule 29.15 requires: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion." In *Crawford v. State*, 834 S.W.2d 749, 752 (Mo. banc 1992), we concluded that "verified" as used in Rule 29.15 means that a declaration must be made in a manner that is supported by a movant's oath or affirmation. "A movant does that by subscribing to the required declaration while in the presence of someone authorized by Missouri law to administer oaths and affirmations." *Id.* For inmates such as defendant White, post-conviction motions are generally verified by a notary located in the correctional facility. In our experience, defendants who are incarcerated frequently complain that they have difficulty arranging for a notary public to verify their post-conviction motions so that they can be timely filed. We pass no judgment of the validity of this excuse. But death penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so that they can reach a just and timely result, especially in death penalty cases. The public is frustrated with the drawn-out nature of death penalty cases and, therefore, we need to refine the post-conviction motion requirements to expedite the proceedings.

Although we wish to avoid any unnecessary technicalities that hinder a movant's ability to file timely a pro se 29.15 motion, we remain stringent about the time requirements for post-conviction motions. To alleviate one technicality, however, we hold that henceforth, for purposes of filing a pro se 29.15 motion, the defendant's signature will be sufficient verification "that he has listed all grounds for relief known to him and acknowledging his understanding that he

waives any ground for relief known to him that is not listed in the motion." Rule 29.15(d). We will still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion.

Although we are relaxing the verification requirement for defendants' pro se 29.15 motions, we will continue to require amended motions filed pursuant to Rule 29.15(e) to be properly verified. This is in part because "[a]n amended motion differs significantly from the original motion." *Bullard v State.* 853 S.W.2d 921, 922 (Mo. banc 1993). The original pro se motion is relatively informal "and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." *Id.* On the other hand, "an amended motion is a final pleading, which requires legal expertise. Counsel must be appointed to represent indigent movants in order to ensure its proper drafting." *Id., citing* Rule 29.15(e). Since the amended motion is drafted by appointed counsel, it is necessary to have the amended motion verified in order to ensure that movant believes it is accurate and constitutes all grounds for relief known to movant. Additionally, this helps to ensure that movant is adequately represented. We will, therefore, continue to require the verification of amended 29.15(e) motions.

In its order dated August 28, 1992, the motion court dismissed all of White's 29.15 motions because they were not properly verified. However, the court stated that in the alternative, it overruled defendant's 29.15 motion on the merits for all the reasons stated in the findings of fact and conclusions of law dated August 1, 1990. In those findings of fact and conclusions of law, the motion court failed to rule on all the defendant's claims set forth in his pro se 29.15 motion. Because defendant's amended 29.15 motion specifically stated that it

was "intended to supplement and not supersede movant's pro se motion," the motion court should have made findings on all the issues raised in defendant's pro se 29.15 motion. Therefore, we remand back to the motion court for findings of fact and conclusions of law on defendant's pro se 29.15 motion. On remand, the motion court shall conform to all of this Court's holdings in *Barry v. State,* 850 S.W.2d 348 (Mo. banc. 1993).

FIRST AND SECOND AMENDED 29.15 MOTIONS

The next issue is whether the trial court had jurisdiction to rule on defendant's first and second amended motions. Defendant's amended motion must be properly verified and filed in a timely fashion in order to comply with Rule 29.15(f), which states:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for *one additional period not to exceed thirty days.*

Id. (Emphasis added.) Unless both the time and verification requirements are met, the motion court has no jurisdiction to rule on the defendant's 29.15 motion.

First, we will address the verification requirement and the effect that defendant White having signed it in blank had on the motion court's jurisdiction. The purpose of requiring verification of defendant's amended motion is to ensure the accuracy and completeness of the 29.15 motion drafted by defendant's counsel. It also discourages frivolous and unfounded allegations. *Malone v. State,* 798 S.W.2d 149, 151

(Mo. banc 1990). In this case, defendant attached a handwritten verification, which he had signed on November 14, 1989, to both his first and second amended motions. This verification, which was signed in blank, predated the existence of both amended motions. Defendant White stated that he signed the verification in blank during his initial meeting with his appointed counsel "so that it [the verification] would be available when the amended motion was ready." By signing the verification in blank, defendant knew or should have known that he was an active participant in falsely verifying a document that had not yet been written. We, therefore, will not allow him to later argue that the document that he falsely verified is incomplete or does not raise all grounds known for relief. When white signed the verification in blank, he waived all his rights to complain about its content.

The fact that defendant White signed the verification in blank also has no effect on the motion court's jurisdiction. We will not allow a defendant who actively participates in falsifying the verification to argue lack of jurisdiction because of that improper verification. Once White signed the verification and it was notarized by his attorney, he waived all right to assert that the verification requirement of Rule 29.15 was not met for the purpose of establishing the motion court's jurisdiction.

The second requirement that must be met to invoke the court's jurisdiction is that the motion be timely filed. Rule 29.15 clearly states that defendant has thirty days to file his amended motion and that the court may extend the period for filing "for one additional period not to exceed thirty days." *Id.* In other words, the defendant is allowed a maximum limit of sixty days to file his amended motion from the day his counsel is appointed. "This Court has held that the effective date of appointment of counsel is the date on which the office of public

defender is designated rather than the date of counsel's entry of appearance." *White*, 813 S.W.2d at 864, *citing Schneider v. State*, 787 S.W.2d 718, 720 (Mo. banc), *cert. denied*. 498 U.S. 882 (1990).

Here, the public defender's office was appointed on September 25, 1989. Defendant's first attorney was given until October 23, 1989, to file his amended motion. Defendant's first attorney then requested a thirty day extension, and he was granted until November 23, 1989, to file his amended motion. On November 9, defendant's first attorney withdrew and his second appointed attorney entered an appearance. After entering his appearance, however, defendant's second appointed counsel failed to file an amended motion timely. The extension "for one additional period not to exceed thirty days" expired on November 23, 1989. Rule 29.15(f). Defendant's second attorney did not file his first amended motion until November 27, 1989, which was four days after the deadline. On that same day, defendant's second counsel also requested and later received an additional sixty days to file a second amended motion. But by this time he had already been granted his one authorized extension and had exceeded this extension as well as the overall sixty day time requirement of Rule 29.15. By granting the request for a second extension of time, the motion court exceeded its jurisdiction because Rule 29.15 clearly states that the court may grant only one extension not to exceed thirty days. Thus, the court had no jurisdiction to rule on defendant's first or second amended motions because they were all filed out of time. The motion court, therefore, should have dismissed the amended motions as untimely and proceeded on the issue of abandonment pursuant to *Sanders* if there was a request to do so after the dismissal.

ABANDONMENT

Once we have decided that the motion court had no jurisdiction to rule on the defendant's untimely amended motions, it becomes necessary to determine whether the defendant was abandoned by counsel. Because the motion court has already conducted a detailed *Sanders* hearing on this issue, we will examine the record and make a determination on the issue of abandonment.

The defendant argues that the motion court's finding at the *Sanders* hearing that White was not abandoned by post-conviction counsel was clearly erroneous because it was not supported by the record. The basis of the motion court's decision was that it never had jurisdiction over defendant's pro se 29.15 motion because it was not properly verified. The court reasoned that it was impossible to abandon a cause that did not exist. As discussed earlier, we have already concluded that defendant's pro se motion properly invoked the jurisdiction of the motion court.

However, the motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992. In those earlier findings, the motion court also concluded that there was no abandonment as a result of counsel's withdrawal, failure to file a timely amended motion, failure to verify, or failure to allege sufficient facts and grounds for relief. The court reasoned that: "A withdrawal with or without leave of court would be an abandonment if a new attorney was left too little time to accomplish his goals." The court then stated that since defendant's second attorney was given sixty days in which to file his amended motion, there was ample time to achieve the requirements of Rule 29.15(e). We have concluded, however, that the amended motions filed by defendant's second attorney were not timely. Thus, the motion court's determination that defendant's second appointed counsel had sixty days in which to file his amended motion is incorrect. Defendant's first and

only extension authorized under Rule 29.15 extended the filing date to November 23, 1989. Defendant's first attorney withdrew on November 9, 1989. His second appointed attorney entered his appearance on that same day. That left defendant's second appointed attorney from November 9 to November 23 to file the amended motion. That left him fourteen days (excluding November 9), as opposed to sixty days as suggested by the motion court, to meet with the defendant, research all the possible grounds for relief, and draft the amended motion. This leaves serious question as to whether defendant was abandoned by his first attorney's withdrawal without permission from the motion court and his second attorney's failure to file an amended motion timely.

In *Sanders v. State*, 807 S.W.2d 493, we were faced with the question of whether defendant's counsel's failure to file an amended 29.15 motion timely amounted to abandonment. On remand, we instructed the trial court that "[t]he burden shall be on the movant to demonstrate that the untimeliness is not the result of negligence or intentional conduct of the movant, but is due to counsel's failure to comply with Rule 29.15(f). If the court determines that the untimeliness resulted from negligence or intentional conduct of movant, the court shall not permit the filing" of an untimely 29.15 amended motion. *Id.* at 495. But if the untimeliness resulted exclusively from counsel's action or inaction, the court should consider movant's amended motion as if it was timely filed. *Id.*

We conclude that the untimely filing of defendant's amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel. The motion court made a similar finding, although it based its holding on other grounds, when it concluded "that no action or inaction by movant had any effect on]defendant's second

counsel's] timing of the filing of the motion." In his affidavit, defendant White stated that: (1) he gave his second appointed counsel "all the information [he] had available to [him] to assist in the preparation of an amended motion," (2) he "did nothing to limit the content of the amended motion," and (3) he did "nothing to delay the filing." This was corroborated by the testimony of defendant's second appointed counsel at the *Sanders* hearing when he testified that: (1) he failed to file a timely motion because there was insufficient time for him to investigate, research and draft the motion, (2) nothing that White did or said or refused to do interfered with his ability to file a timely amended motion, and (3) it was the decision of the public defender's office, rather than White, "to switch attorneys." Defendant's first appointed attorney confirmed that the decision "to switch attorneys" was made solely by the public defender's office. Based on the record, we conclude that defendant White was abandoned by the decision of the public defender's office to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file a timely amended motion. We find that no action or inaction by White contributed to the delayed filing.

Rule 29.15(e) states: "For good cause shown, appointed counsel may be permitted to withdraw." At a minimum, this means that the motion court must enter an order finding good cause and granting permission for the exchange of counsel. No such order was granted in this case. Neither of defendant's appointed counsel should have participated in this exchange of counsel (1) without an order showing good cause, or (2) so near to the deadline for filing a timely amended motion. An attorney should not withdraw so close to the filing date that the second counsel has insufficient time to meet all the requirements of

Rule 29.15. By his own admission, defendant's second counsel did not have enough time to file a timely amended motion after he entered his appearance. Moreover, the conduct of the public defender's office is at least questionable in removing defendant's first appointed counsel fourteen days prior to the filing date, especially since it was done without leave of the motion court. Although we pass no final judgment on either of defendant's attorneys or the public defender's office, we request that the Disciplinary Counsel investigate and determine whether any considerations or disciplinary rules were broken.[2]

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[2]All public defenders are required to be attorneys licensed to practice law in Missouri. § 600.021, RSMo 1986. We believe that Rule 29.15 permits the motion court to appoint a public defender's office or an individual attorney to represent a movant. Rule 29.15 only states that the "court shall cause counsel to be appointed for the movant." It does not require that the court appoint a specific attorney to represent a movant in filing a 29.15 motion. The court, therefore, can appoint a public defender's office because that will "cause counsel to be appointed for the movant." Rule 29.15(f) (emphasis added). Moreover, this Court recognized the appropriateness of such an appointment in White, 813 S.W.2d at 864, citing Schneider, 787 S W.2d at 720, when we held "that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance."

The public defender's office has requested, in certain instances, that the courts appoint one of its offices rather than a specific attorney to represent a movant pursuant to Rule 29.15. If the court appoints a public defender's office to represent a movant, we will hold the supervising attorney of that office responsible as if that attorney had been appointed individually to represent movant. Once an individual attorney

Second, defendant argues that he was abandoned by counsel's failure to ensure that the motion was properly verified. As noted earlier, the amended motions met the verification requirement for the purpose of jurisdiction. Thus, the defendant was not abandoned in regard to the verification requirement. This is especially true since defendant's intentional conduct resulted in the verification being signed prior to the completion of the amended motions. *Sanders*, 807 S.W.2d at 495. This point is denied.

Finally, defendant argues that post-conviction counsel abandoned him by failing to allege sufficient facts and grounds for relief in his amended motions. This argument has no merit. Absent total abandonment, such as failure to properly file an amended motion as required by Rule 29.15(e), defendant has no right to effective assistance of Post-conviction counsel. The United States Supreme Court has stated that there is no constitutional right to post-conviction counsel and that failure of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant. *White*, 813 S.W.2d at 867 (Holstein, J., concurring), *citing Coleman v. Thompson* 501 U.S.____, 111 S.Ct. 2546 (1991). Thus, a defendant's right to post-conviction counsel exists only under Rule 29.15(e) and our holdings in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders*, 807 S.W.2d 493.

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from a public defender's office enters an appearance on behalf of a movant, we will also hold that attorney responsible as if appointed by name in the court's order. In this case, the "State Public Defender for the Sixteenth Judicial Circuit [was] appointed to represent movant in his motion for relief pursuant to Rule 29.15." Thus, the attorney in charge of that office should be held responsible for the conduct of the public defender's office in this case.

Rule 29.15 requires only that the attorney meet with the movant, ascertain whether sufficient facts supporting the grounds in the pro se motion are asserted, and ascertain whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. Rule 29.15(e). "If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds." *Id.* Absent total abandonment of the requirements set forth in Rule 29.15, a defendant has no recourse under *Luleff* and *Sanders*.

Here, counsel met with White and ascertained that an amended motion needed to be filed but failed to file it properly, resulting in abandonment under *Luleff* and *Sanders*. Defendant acknowledges in his affidavit, however, that he told his second appointed counsel of all grounds known to him. Based on that information, defendant's second counsel filed an amended motion, which stated additional facts and grounds for relief pursuant to Rule 29.15(e). Neither the defendant nor his second appointed counsel testified at the Sanders hearing that the first or second amended motion failed to raise all grounds known to them at the time the motions were filed. Therefore, there is nothing in the record to indicate that defendant's second appointed counsel failed to met the minimum requirements set forth in Rule 29.15.

Even if White claims that his second counsel failed to raise all meritorious grounds known to White prior to the filing of the amended motions, defendant waived all challenges to the completeness and accuracy of the amended motions when he signed the verification in blank. We will not permit a movant to falsify a verification and then argue that the contents of the amended motion were insufficient. The defendant's last abandonment argument is denied.

ABANDONMENT REMEDY

Having concluded that the defendant was abandoned by post-conviction counsel's failure to file a timely amended motion, we must decide what remedy is available to the defendant. We have resolved this issue in two ways: (1) appointing new counsel to file an amended motion, or (2) instructing the motion court to treat the previously drafted amended motion as timely. The previous cases, however, have been procedurally different than this one in regard to whether an amended motion was filed and whether the court ruled on the amended motion. In *Luleff*, 807 S.W.2d 495, we remanded to the motion court to determine whether movant was abandoned by counsel's failure to file an amended motion. We instructed the court that if movant was not negligent or otherwise a party to his appointed counsel's failure to file an amended motion, the court should appoint new counsel to file an amended motion if counsel determines that there are any meritorious claims for relief. *See also State v. Bradley*, 811 S.W.2d 379 (Mo. banc 1991). In *Sanders*, 807 S.W.2d 493, where counsel drafted an amended motion but failed to file it timely, we instructed the motion court to treat the amended motion as timely if counsel was exclusively responsible for its late filing. Prior to the remand in *Sanders*, the motion court had dismissed the amended motion as untimely and did not rule on it. In this case, however, the motion court ruled on the untimely amended motions prior to the defendant's appeal.

Defendant contends that we should follow *Luleff* and allow the motion court to appoint new counsel to file a third amended 29.15 motion. The State persuasively argues, however, that in doing so we would permit the defendant a third bite at the apple, which would contravene the purpose of Rule 29.15. The State suggests that we dismiss both motions as untimely. Although we agree with the State that the second

amended motion was properly dismissed as untimely, we reinstate defendant's first amended motion pursuant to *Sanders*.

Defendant White was only abandoned with regard to the timing of his first amended motion, not as to its content. In his affidavit, defendant White stated that he gave his appointed counsel all of the information he had with regard to filing an amended motion. Defendant also signed the verification in blank, which resulted in his waiving any claim that the amended motions were incomplete. Plus, neither the defendant nor his second appointed counsel testified at the *Sanders* hearing that the first amended motion did not contain all grounds known to them at the time it was filed. Defendant's counsel merely complained that the first amended motion was late because be was not given enough time. Therefore, defendant was not abandoned as to the content of his first amended motion. He was only abandoned as to the timeliness of his first amended motion. We, therefore, conclude that defendant's first amended motion should be reinstated.

The defendant is not entitled, however, to have his second amended motion reinstated. We have already determined that defendant was abandoned only by the late filing of his first amended motion. By reinstating the first amended motion, we have cured the timeliness problem, and the first amended motion now meets the minimum requirements of Rule 29.15. To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive under Rule 29.15. Defendant White only had the right to have his appointed counsel draft one amended motion that complied with the requirements of Rule 29.15(e). We are unwilling to grant the defendant any additional relief beyond that which is required by Rule 29.15. Therefore, we will not reinstate the defendant's untimely second amended motion.

Defendant contends, however, that the motion court failed to rule on all of defendant's points in his first amended motion. On remand, the motion court should determine the validity of this contention, which is similar to defendant's claim regarding his pro se motion. The motion court should have drafted findings and conclusions on all of the issues raised in defendant's pro se and first amended motions. On remand, the court should make findings of fact and conclusions of law in accordance with *Barry*, 850 S.W.2d 348.

Defendant also argues that he was denied his right to due process under the Missouri and United States constitutions because the prosecutor drafted the August 1, 1989, findings of fact and conclusions of law. Defendant further argues that the judge's alleged delegation of his duties to the prosecutor deprived White of his right under Article V, Section 1, of the Missouri Constitution to have his post-conviction motion decided by a court vested with judicial power.

Adopting all or part of a party's proposed findings, or adopting by reference the wording of a party's motion, has become a common practice among lawyers and judges in both criminal and civil cases. Courts frequently request both parties to draft findings of fact and conclusions of law that conform to how the court intends to resolve the issues in dispute. The court then takes the parties' recommendations under advisement and either drafts its own findings of fact and conclusions of law or adopts one of the parties' findings in whole or in part. As long as the court thoughtfully and carefully considers the parties' proposed findings and agrees with the content, there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties. Once the trial court determines that it agrees with one of the parties' findings and signs the order, the court has in effect adopted that party's findings as its own.

It is clear from the record that the prosecutor drafted some or all of the August 1, 1990, findings of fact and conclusions of law. We find no constitutional violation regarding this practice as long as the trial court is satisfied that its findings of fact and conclusions of law reflect its independent judgment. Because there *was* no evidence presented that the findings and conclusions did not reflect the court's own independent judgment, this point is denied.

CONCLUSION

Defendant's appeal based on the failure of the motion court to rule on all the issues contained in his pro se and first amended 29.15 motions is reversed and remanded for further proceedings consistent with *Barry*, 850 S.W.2d 348.

ELWOOD L. THOMAS, Judge

All concur.

SUPREME COURT OF MISSOURI
en banc

LEAMON WHITE,	)	FILED
	)	FEB 25, 1997
Appellant,	)	
	)	
v.	)	No. 78459
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County
Honorable Alvin C. Randall, Judge, and Honorable David W. Shinn, Judge

Leamon White was convicted of first degree murder and sentenced to death. This is an appeal from a judgment denying relief pursuant to a motion to vacate judgment and sentence under Rule 29.15. White's primary contention is that his trial attorneys were ineffective in their investigation and presentation of witnesses, conduct of voir dire; sentencing phase strategy, and that they sought to undermine his chances for post-conviction relief in order to insulate themselves from criticism for their deficient performance. Without holding an evidentiary hearing, the circuit court overruled White's Rule 29.15 motion. We find that none of the numerous allegations made by White in his motion for post-conviction relief require an evidentiary hearing. The judgment of the circuit court is affirmed.

I.

White's Rule 29.15 motion has been before this Court on two prior occasions. In the first appeal, *State v. White*, 813

(1992), the facts were set out at length. To summarize, in January 1987, three men entered the home of Don Wright and Carol Kinney, purportedly to buy crack cocaine. Instead, the men tied up Wright, Kinney and her children, Deonta and Raymond, and Earnest Black, a guest in the home. The men beat Mr. Black and Mr. Wright, interrogating them about where to find drugs. Then the men slit Mr. Wright's and Ms. Kinney's throats and left the house, after turning on the gas stove and blowing out the pilot lights. As a result of the savage attack, Don Wright died of strangulation and asphyxiation. The children, who were in bed in a nearby bedroom during the attack, were later able to free themselves and call police. At trial, Ms. Kinney and Mr. Black identified Leamon White as one of the attackers. White was convicted of first degree murder and sentenced to death. On appeal, this Court affirmed the conviction and sentence.

In that opinion, the Court described the circumstances surrounding the filing of White's various motions for post-conviction relief. In August 1989, White filed a pro se motion under Rule 29.15, but failed to have it notarized, apparently because no notary was available to him in prison. The motion court appointed counsel, who later requested an extension of time to file an amended motion. About two weeks before the extension expired, the first attorney withdrew, and another was appointed. Several days after the extended filing period had expired, the newly appointed attorney filed a first amended motion and an application for a further extension of time. That extension was granted, and a second amended motion was filed. The motion court issued a judgment, which included findings of fact and conclusions of law denying relief without an evidentiary hearing on August 1, 1990. Without addressing the motion court's substantive judgment, this Court remanded for findings on whether White had been abandoned by post-conviction counsel.

On remand, the circuit court dismissed the Rule 29.15 motion as not properly verified. In the alternative, the court determined that White was not abandoned by post-conviction counsel and reinstated the original findings and conclusions overruling the motion on the merits. White again appealed the judgment.

In the second appeal, *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), this Court ruled that White's signature was sufficient verification for the pro se Rule 29.15 motion. However, the Court found both amended motions to be untimely because the motion court lacked jurisdiction to grant more than the prescribed thirty-day extension. But this Court reinstated the first amended motion because it concluded that trial counsel's failure to file a timely amended motion constituted abandonment. The Court, however, refused to reinstate the second amended motion, holding that White only had the right to one amended Rule 29.15 motion drafted by counsel. The Court also found that the motion court had failed to address all claims set forth in the pro se and first amended motions. Accordingly, the Court remanded for findings of fact and conclusions of law addressing all claims in the pro se and first amended motions.

On remand, the motion court found that the issues raised in the first amended motion had been addressed in the first judgment on August 1, 1990, and entered new findings of fact and conclusions of law on the claims made in the pro se motion, denying all relief without an evidentiary hearing.

This Court now considers only the motion court's rulings on the allegations contained in White's pro se and first amended Rule 29.15 motions. Review of the rulings is limited to determining whether they are clearly erroneous. *Rule 29.15(j)* (1988). Where the trial court makes findings of fact and conclusions of law, a proper result will be affirmed even if

one of the conclusions is in error. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991) (per curiam).

II.

White argues that the trial court erred in refusing to grant an evidentiary hearing on the numerous claims of ineffective assistance of counsel raised in his Rule 29.15 motions. An evidentiary hearing is not required where "the motion and the files and record of the case conclusively show that movant is entitled to no relief[.]" *Rule 29.15(g)* (1988).

A Rule 29.15 motion is subject to requirements of timely filing and limitations on amendments. *Rule 29.15(b)(f)* (1988). Moreover, such motion must be substantially in the form provided by Form 40. *Rule 29.15(b)* (1988). Paragraph 8 of Form 40 requires a movant to state "concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence." Paragraph 9 of Form 40 requires a concise statement of "the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely[.]" Once counsel is appointed, "[i]f the motion does not assert sufficient facts... counsel shall file an amended motion which sufficiently alleges the additional facts and grounds." *Rule 29.15(e)*. The redundant requirement to plead facts makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing

reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. *See Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. For that reason, it has been held that no evidentiary hearing will be required unless the motion meets three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because none of White's allegations satisfy this standard, his motion was properly overruled without an evidentiary hearing.

A.

White alleges counsel was ineffective in that:

> [He] required and compelled movant to take the witness stand.., to condone, verify and/or sanction trial counsels [sic] trial strategy, i.e., what witnesses to call, what questions to ask and what evidense [sic] to marshall [sic] in general. This improper conduct of counsel impermissably [sic] invaded the provence [sic] of the attorney cliant [sic] relationship and

exposed movant to cross-examination by the state. Said conduct was prejudicial to movant.

The pleadings purport to allege improper conflict of interest between movant and trial counsel. Inherent in every criminal case is counsel's desire to protect himself from future claims of ineffective assistance of counsel and the defendant's desire to preserve claims of ineffective assistance of counsel in the event of conviction. It is not improper for counsel to take steps to protect his own interest if in doing so, he does not disclose confidences of his client which harm the client's interest. There is no per se rule that prejudice will be presumed when counsel makes a record that has the effect of refuting subsequent claims of ineffective assistance of counsel. As with other matters, a post-conviction pleading asserting ineffective assistance of counsel must allege facts showing what counsel did or said that was improper and facts showing how the movant was prejudiced. Here counsel is faulted for having asked movant on a number of occasions if movant agreed with unspecified strategic decisions of counsel. Aside from conclusions, no specific information disclosed by the questioning is alleged in the pleadings. Neither is there any allegation as to how such disclosure might have harmed movant so as to undermine confidence in the outcome of the trial.

Such conclusions, without more, do not assert either ineffective representation or prejudice. Movant did not plead facts entitling him to relief on this issue. Thus, he was not entitled to an evidentiary hearing.

B.

White alleges he was denied effective representation of counsel because one of his attorneys represented other, unrelated, capital defendants simultaneously. He alleges that one of his trial attorneys "was unable to devote his full time and

attention to movants [sic] trial due to proceedings being conducted in other forums at the same time as movants [sic] trial, thus resulting in [the attorney] leaving movants [sic] murder trial while court was in session to attend other proceedings." In denying this claim, the motion court concluded:

> [M]ovant's allegation... fails to allege how he was prejudiced by counsel's representation of other clients while movant's trial was in progress, nor has movant alleged any facts regarding counsel's supposed conflict of interest. Movant's allegation is especially meritless considering that he was also represented at trial by [a second attorney], about whom movant has not made any allegation of conflict of interest.

This conclusion is not clearly erroneous as appellant's contention is refuted by the record. White fails to acknowledge the fact that he was represented by two trial attorneys. White's claim would lead one to incorrectly believe he was represented by only one. White fails to challenge co-counsel's representation during the periods in which one of his attorneys was allegedly absent. White also fails to set forth with specificity how he was prejudiced by the attorney's absence. The motion court properly rejected this claim without a hearing.

C.

White contends trial counsel was ineffective in the following regard:

> [C]ounsel engaged in unethical and improper conversation with the victims [sic] immediate

> family members. Said conversations involved discussions by defense counsel concerning the merits of movants [sic] defense and movants [sic] trial strategy, all to the prejudice of movant. Defense counsel knowingly violated the attorney-cliant [sic] relationship by divulging the aforestated, and this conduct is move [sic] grevious [sic] when defense counsel knew or reasonably should have known that the victims [sic] family members were relaying all information to the States [sic] attorney.

The motion court rejected White's claim on the basis that no showing of prejudice was made. The court properly denied an evidentiary hearing on this claim as White's allegations are merely conclusions and speculation.

By reading the pleadings, one is unable to discern what was said by counsel that was unethical or improper or what tidbits of trial strategy were communicated that might conceivably have prejudiced the movant. White's own brief demonstrates the speculative nature of the claim where he says,

> *If* Mr. White's attorney was, in fact, discussing the merits of Mr. White's defense, and his trial strategy with members of the family and *if* he knew, or reasonably should have known, that the family members were conveying that information to the prosecutor, *then* counsel was guilty of an unethical breach of loyalty to his client.

(Emphasis added.) To obtain an evidentiary hearing, a movant must allege facts, not speculative conclusions, warranting relief. *Starks*, 856 S.W.2d at 336. As White does not specify what was disclosed to the victim's family members, he fails to

show that but for the disclosures, the outcome of the trial may have been different. Because of the failure to allege these facts, the motion court properly denied the claim.

D.

White contends that counsel was ineffective for failing to conduct pre-trial interviews or depositions of key witnesses, including Carol Kinney, Earnest Black, Deonta Kinney, and Raymond Kinney.

In its findings of fact and conclusions of law, the motion court found that defense counsel adequately utilized alternatives to conducting interviews and depositions of the eyewitnesses:

> In this case, while defendant's attorney's [sic] had not talked to the eyewitnesses in this case or deposed them, they had statements given by those witnesses in the police reports, as well as depositions given by those same witnesses in the defendant's and co-defendant's cases[,] either of which could have been used to impeach those witnesses if they thought it the correct strategy to utilize. The trial transcript is replete with instances with which defense counsel used these depositions and police reports to impeach the State's witnesses.

No challenge is made to the trial court's finding of the existence of depositions from other cases and police reports containing statements of the witnesses. The record plainly supports the motion court's finding on this issue. In view of the availability of depositions from other related cases and statements of witnesses in investigative reports, the motion court correctly found that the attorneys' failure to interview and

depose witnesses does not amount to ineffective assistance of counsel. There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. Stepter*, 794 S.W.2d 649, 657 (Mo. banc 1990) (citing *Strickland*, 466 U.S. at 689). White has failed to allege facts that take this case outside the presumption that his attorneys' decision not to conduct a more probing investigation of the witnesses was something other than a reasonable choice of strategy.

In addition, the pleadings fail to allege facts that, if true, would entitle movant to relief. Specifically, White fails to identify what the attorneys would have discovered, that was not otherwise known to trial counsel, had they interviewed and deposed the witnesses. White argues in his brief on appeal that had his attorneys interviewed and deposed Raymond and Deonta Kinney, counsel would have discovered that the children had identified another man, A.J., as the killer. However, the motion suggests only that one of three assailants was not movant. How that exculpates movant is not explained.

Finally, the trial transcript directly refutes an inference that White's trial attorneys were unaware of what the children knew about the crime. Raymond Kinney was called to testify as a defense witness. Raymond testified that he and Deonta were in bed when the incident took place. Their bed was in a separate room from where the assaults and murder took place. The lights were off in the bedroom. Raymond saw one assailant and that person spoke with a Jamaican accent. Raymond further testified that the defense attorneys had brought him to court on a previous occasion to look at White and at that time Raymond did not recognize White. Apparently, White's counsel was aware that Raymond would testify favorably and had seen and talked to him prior to trial. These facts refute White's suggestion that his attorneys failed to interview the children or take steps to determine what the children knew about the crime.

Because White failed to allege what facts, if any, would have been developed by a more extensive interview or deposition of witnesses and how that would have aided movant, the pleading fails to allege facts entitling him to relief on these grounds. Moreover, the claim is refuted by the record.

F.

In his first amended motion, White makes the following allegations:

> D. That counsel *failed to... adduce testimony* from [Ben] Kinney during trial that the victim of the murder, Don Wright, or his girlfriend - eye witness [sic] and co-victim, Carol Kinney were drug dealers of cocaine to establish that others could have committed these offenses[.]
>
> E. That counsel *failed to adduce testimony* from Ben Kinney that Ben Kinney and Don Wright sold drugs for two men by the names of AJ and Josh; this was relevant because AJ and Josh had threatened Ben Kinney and Raymond and Deonat [sic] Kinney had identified AJ as the second perpetrator of this murder: this conflicted with Carol Kinney and Earnest Black saying that the second perpetrator was Movant[.]
>
> F. That counsel *failed to adduce testimony* from Deonat [sic] and Raymond Kinney that AJ was the second perpetrator of this murder not Movant[.]

(Emphasis added.)

All three paragraphs assert the obvious and irrefutable truth that defense counsel "failed to adduce testimony" favorable to movant. The question remaining is whether the bare allegation of counsel's failure to adduce certain testimony entitles movant to any relief. Clearly, the answer is no. "[T]o prevail on a claim of ineffective assistance of counsel due to counsel's failure to call a witness to testify, the movant must show that the witness would have testified if called and that the witness's testimony would have aided the movant's defense." *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). The burden is on movant to plead facts, not conclusions, establishing not only who the witnesses were but what they would testify to, if called, and that such evidence would provide a viable defense. White's pleadings stop short of directly alleging what the witnesses would testify to, if called. As such, they are deficient and no hearing was required on these claims.

The requirement that a movant directly allege facts to which the witnesses would have testified, if called, is more than a technicality. In every post-conviction case, it may truthfully be said that there are innumerable witnesses whose favorable testimony on a myriad of issues was not adduced by trial counsel. The subtle wording "counsel failed to adduce" suggests what witnesses might say without directly stating that they were available and would have testified favorably to movant, if called. To declare such pleading to be sufficient would permit a post-conviction litigant and lawyer to sandbag the State and the motion court with numerous unsubstantiated claims of deficient performance of trial counsel in failing to "adduce" testimony from witnesses. The State would then be put to the task of having to investigate what the witnesses would say, and the court would be required to hold a hearing, even though there may not be a scintilla of evidence that the

witnesses were available to testify and that they would, in fact, testify favorably to the movant. Meanwhile, the post-conviction movant and the post-conviction counsel could truthfully say they had made no misrepresentation of fact to the court, which would subject them to sanctions under the Rules of Civil Procedure or, in the case of a lawyer, sanctions pursuant to the Rules of Professional Conduct.[1] To hold such allegations sufficient would turn the pleadings process into clever gamesmanship.

Finally, even if one assumes the motion alleged that one or both of the Kinney children, if called to testify, would have identified A.J. as one of the three assailants, the allegations are still insufficient. All that may be said of such assumed testimony is that one of three assailants was not movant. No facts are asserted showing movant was not one of the other two persons who committed the murder, and no facts alleged explain how the testimony of the children would tend to exculpate White.

F.

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[1]Rule 55.03(b) provides in part: "By presenting or maintaining a claim . . . in a pleading, . . . an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

. . . .

(3) the allegations and other factual contentions have evidentiary support. . ."

Rule 4, Rules of Professional Conduct 3.1 provides in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . ."

White alleges that "counsel failed to attack the pretrial identification of Movant by Carol Kinney or the in-court identification of Movant by Carol Kinney or Earnest Black by way of a Motion to Suppress when the identification procedures utilized by police were unnecessarily suggestive and conducive to an irreparable mistaken identification[.]" What these allegedly "suggestive and conducive" procedures were, however, is not specified in the motion. The motion fails to provide sufficient factual allegations to support the conclusion that the police used improperly suggestive identification. As such, the pleading is deficient and this claim was properly denied without a hearing.

G.

White alleges that his trial attorneys were ineffective because they failed to impeach witnesses Black and Kinney with "prior inconsistent statements." This allegation, even if true, is insufficient to warrant relief.

Failure to impeach a witness with a prior inconsistent statement does not, per se, constitute deficient performance of counsel. *See, e.g., Roberts v. State*, 775 S.W.2d 92. 9495 (Mo. banc 1989), *cert. denied*, 494 U.S. 1039 (1990). A defense attorney may decide not to impeach a witness as a matter of trial strategy. *Id.* White's pleadings fail to specify the nature or content of the alleged "prior inconsistent" statements. A bare allegation that certain witnesses made "prior inconsistent" statements without stating what was said and how it conflicted with what was testified to at trial is a conclusion, not a fact. Many inconsistent statements are so insignificant as to be meaningless and others are so easily explainable as to not justify being presented at trial. Because White fails to disclose the content and circumstances of the supposed inconsistent statements, he provides no factual basis for a finding of either inadequate representation or prejudice under the *Strickland* test.

Because White failed to allege facts entitling him to relief, the motion court properly denied this point without an evidentiary hearing.

Moreover, the record refutes White's claim that his attorneys failed to impeach Carol Kinney and Earnest Black with prior inconsistent statements. The trial transcript reveals several instances in which both Kinney and Black were questioned about prior inconsistent statements given to police, to an investigator or at a deposition, if White's claim is that his attorneys were ineffective in failing to go far enough in impeaching Kinney and Black, it must be rejected because the *extent* of impeachment is a decision of trial strategy. *See Kenley v. State*, 759 S.W.2d 340, 349 (Mo. App. 1988) (per curiam), *rev'd on other grounds sub nom. Kenley v. Armontrout*, 397 F.2d 1298 (8th Cir. 1991). In virtually every case, the extent of cross-examination must be left to the judgment of counsel. *Id.* The old adage among trial lawyers that "you only need to prove a witness is a liar once" has particular application here.

H.

White contends that counsel was ineffective in his cross-examination of witness Earnest Black, resulting in the witness identifying appellant as one of the perpetrators. White also alleges that counsel was ineffective in not making a motion to suppress the in-court identification. On this claim, the motion court concluded as follows:

> It is clear from the transcript that counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is

also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before and at trial. At most. therefore, Black's response to counsel's questions was cumulative.

The ruling of the motion court is not in error. White has not alleged facts that would warrant relief if true. Review of the record demonstrates that defense counsel sought to show that the witness had misidentified White. Black had testified on direct examination that White "looks like the second man" involved in the murder. Counsel's cross-examination of Black regarding his confidence in his identification of White as one of the perpetrators was consistent with defense counsel's misidentification theory. Counsel's decision to cross-examine Black in this manner was a strategy decision, which will not support a finding of ineffective assistance. *See State v. Storey*, 901 S.W.2d 886, 893 (Mo. banc 1995). Furthermore, in light of Mr. Black's and Ms. Kinney's other identifications of White, the cross-examination complained of by White would not have resulted in prejudice.

I.

White alleges that counsel was ineffective for failing to object to the presentation, at trial, of a videotape lineup in which he was identified by State's witnesses before trial. White's reliance on *State v. Seever*, 733 S.W.2d 438 (Mo. banc 1972), is misplaced. In *Seever*, the State's witness, a child, made a videotaped statement detailing her account of defendant's sexual contact with her. At trial, the State called the victim to testify, after playing her videotaped statement for the jury. The Court held that the showing of the video was improper bolstering. *Id.* at 441. Unlike *Seever*, the videotape at issue in this case was not testimony offered to duplicate that ora

witness. Rather, the videotape was admissible evidence of the circumstances of the initial out-of-court identification. The motion court did not err in finding that the trial court would have overruled this objection. Trial counsel cannot be deemed ineffective for failing to object to admissible evidence. *See Clemmons v. State*, 785 S.W.2d 524, 529 (Mo. banc 1990), *cert. denied*, 498 U.S. 882 (1990).

J.

White argues that his attorneys were ineffective in failing to call an expert to testify on the effect of drug use on the mind in regard to receiving, processing and interpreting information. According to White, "[h]ad counsel presented said expert testimony[,] the jury could have reasonably found that the incourt [sic] identification of movant was not reliable due to the witnesses [sic] admitted drug consumption and influence at the cogent times."

White fails to allege sufficient facts to establish that trial counsel's performance was deficient. "To support a charge of ineffective assistance of counsel based on failure to secure the testimony of an expert witness, at a minimum, movant is required to show what the evidence would have been." *State v. Twenter*, 818 S.W.2d 628, 636 (Mo. banc 1991). Here, White does not specify what an expert's testimony would have been, but speculates that upon some presumed testimony the jury "could have easily found" the in-court identifications unreliable.

White also fails to allege facts establishing prejudice. White's attorneys made drug use of the witnesses an issue without expert testimony. Both Ms. Kinney and Mr. Black admitted on the stand that they had taken drugs before the killing and were cross-examined on the issue of how the drug use affected their perceptions. Thus, even if true, this allegation

does not entitle White to relief as it fails both prongs of the *Strickland* test.

K.

White claims that "counsel failed to object to the State withholding and supressing [sic] evidense [sic]" that "[t]he State had shown witness[es] Kinney and Black a photograph of [White] prior to these witnesses making an identification. . . ." But, as White says in his motion, this allegedly withheld evidence came to light during trial. As the motion court found, both Ms. Kinney and Mr. Black were cross-examined on their failure to identify White from the photograph. Furthermore, White admits that his attorneys were informed about the photo by his previous attorney. Thus, White fails to allege facts establishing that he was prejudiced by his counsel's failure to object to the State's alleged withholding of evidence. The motion court did not err in denying this point without an evidentiary hearing.

L.

In White's pro se motion, he claims that his trial counsel was ineffective for failing to call an alibi witness. This allegation again fails to allege facts entitling movant to relief. White provides no details other than the name of the witness and the unsupported claim that the witness would provide an alibi. White fails to set forth what the alleged witness would testify to, if called, and fails to describe how the witness's testimony would provide an alibi. White has failed to allege any facts showing (1) that the witness could have been located through a reasonable investigation, (2) what the witness would have testified to if called, and (3) that the witness's testimony would have provided a viable defense. *State v. Ramsey*, 864 S.W. 320, 340 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994). As such, the motion court did not err in denying an

evidentiary hearing on trial counsel's failure to call White's alleged alibi witness.

M.

White alleges that counsel was ineffective for "fail[ing] to object to the court informing members of the venire that the governor could pardon Movant[.]" White's claim that the trial court erred in giving such an instruction was rejected on direct appeal. *White*, 813 S.W.2d at 865. Thus, the motion court did not err in finding that an objection to the court's statement would have been meritless.

N.

White contends that counsel rendered ineffective assistance upon failing to object to the State's improper voir dire, wherein the prosecutor did not limit the questioning to the general circumstances of the offense but instead provided specific details in order to predispose the jurors. "We do not permit counsel . . . to try the case on voir dire by presentation of the facts in explicit detail." *State v. Antwine*, 743 S.W.2d 51, 58 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988). However, a revelation of some portion of the facts of a case during voir dire is necessary to ascertain whether a potential juror's views would substantially impair his ability to be impartial and perform his duties in accordance with the court's instructions. *State v. Gray*, 887 S.W.2d 369, 382 (Mo. banc 1994), *cert. denied*, ___U.S.___, 115 S.Ct. 1414 (1995). White "fails to identify any statements by the State that were either argumentative or prejudicial in the context in which they were made." *Antwine*, 742 S.W.2d at 59. Without alleging any facts showing prejudice, White fails to establish that the State's voir dire was improper. *See id.* Hence, failure to object to the State's voir dire cannot provide a basis for a claim of ineffective assistance of counsel. The motion court properly denied this

point.

O.

White contends that trial counsel was ineffective in that he wasted a peremptory strike on a venireperson the trial court had already excused for cause due to illness. White fails to allege prejudice based on counsel's use of the peremptory strike. He must allege facts demonstrating that but for counsel's allegedly deficient performance, the result of the trial would have been different. *See Storey*, 901 S.W.2d at 893. Because White makes no such allegation, White is entitled to no relief on this claim.

P.

White alleges that "counsel failed and refused to conduct any meaningful voir dire examination, and failed and refused to make any objections... to the states [sic] request for jurors being struck for cause. . . . Counsel also failed to make any effort to rehabilitate potential jurors who spoke ambiguously as to their position concerning the imposition of the death penalty." White, however, fails to specify what was deficient about counsel's voir dire examination. The motion is also silent as to which strikes counsel should have objected to, and which jurors counsel should have attempted to rehabilitate. Because White has failed to plead any specific information, his pleading does not warrant relief.

However, the motion court found that White had alleged sufficient facts to allow a judgment on this issue as to one juror. The court further found that this juror had expressed a substantial inability to impose the death penalty and was properly struck for cause. The juror in question said that he was opposed to the death penalty for religious reasons and could not consider the death penalty. It was proper to strike this juror for

cause. *See State v. Six*, 805 S.W.2d 159, 166 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). The motion court did not err in concluding that objecting to the strike of this juror would have been fruitless.

Q.

White alleges counsel's ineffectiveness for failing to object to the trial court's voir dire examination wherein the court asked whether jurors could consider sentencing White to death, rather than asking whether they could consider the entire range of punishment. The record clearly refutes White's claim. The court examined certain venirepersons on their ability to consider the range of punishment. The court examined several venirepersons, using essentially the same phrasing each time: "if the jury finds the defendant guilty of murder in the first degree, the only possible sentences are life in prison without parole and the death sentence. Would you be able to consider both of those punishments?" Thus, the record refutes White's allegation by reflecting that the court asked whether the venireperson could consider the range of punishment. The motion court properly denied this claim.

R.

White contends that counsel was ineffective in not challenging the fact that voir dire had been conducted off the record, by a judge other than the trial judge, and without appellant being present. White alleges that, as a result, he "was denied a full and complete transcript from which to perfect his appeal." This allegation is clearly refuted by the record, which includes a transcript of the voir dire proceeding. White does not specify what portions of the voir dire proceeding are missing from the trial transcript. Though White alleges that he was not present at some portion of the voir dire, he fails to identify at what stage he was purportedly absent. He does not contend that

he was not present for any portion of the general or death qualification phases of the voir dire. Therefore, as the motion court concluded, White does not allege prejudice with any specificity and his claim, therefore, does not warrant a hearing.

S.

White contends that counsel rendered ineffective assistance "when counsel failed and refused to properly object to the court reading instructions to the jury, that only became proper at the close of evidense [sic], during voir dire." The motion court concluded the claim was meritless, finding:

> [T]he transcript clearly shows that all instructions were read at the appropriate time, and movant has failed to show how this has prejudiced him. The only instruction which was read at an irregular time was the instruction explaining what an objection being sustained meant, which was reread, because a juror didn't understand it the first time it was read.

Without identifying the instruction that was purportedly improperly read, and without any supporting authority, White contends that the motion court's finding is clearly erroneous and that "without a hearing it is impossible to know why counsel failed to object and whether the jurors unduly emphasized this instruction to Mr. White's detriment." The record reveals no patently improper instruction during voir dire. White fails to allege facts, not refuted by the record, warranting relief. In the absence of such factual allegations, he is not entitled to an evidentiary hearing.

T.

White contends that counsel was ineffective in not

making a proper objection during voir dire when the State's attorney advised the jury of his opinion as to what constituted first degree murder, thereby placing impermissible legal theories before the jury.

The motion court correctly concluded that counsel's objection to the State's comments would have been overruled. It is clear from the page of the transcript that movant references that, at most, the prosecutor gave an example of the types of crime that would carry a possible death sentence. Nowhere does the prosecutor say what he thinks first degree murder is. Moreover, White fails to allege facts establishing that he was prejudiced by the prosecutor's comment.

U.

White alleges that counsel "failed to take the necessary steps to preclude the jury, witnesses and the general public from being able to overhear each and every bench conference . . . [which] without question prejudiced" him. White does not, however, describe the substance of the bench conferences. The motion court correctly found that this allegation was insufficient because White fails to specify the allegedly prejudicial substance of the bench conferences. The court did not err in denying a hearing on this issue.

V.

White alleges that "counsel failed and refused to request that the court instruct the jury on the lesser included offenses of second degree murder and manslaughter when such instructions were supported by the evidence." A court is required to instruct on lesser included offenses only if the evidence provides a basis for both an acquittal of the greater offense and a conviction of the lesser offense. *§556.046*, RSMo 1994; *State v. Mease*, 842 S.W.2d 98, 110-11 (Mo. banc 1992), *cert. denied*, 508 U.S. 918

(1993). White fails to point to any evidence that provides a basis for both an acquittal of first degree murder and a conviction of lesser offenses of second degree murder and manslaughter. Therefore, he has failed to allege facts showing that had counsel requested the instructions on these lesser included offenses, the instructions would have been given.

W.

White alleges that his counsel was ineffective for failing to object to the mitigating circumstances instruction given to jurors at the penalty phase of his trial because it was contrary to *Mills v. Maryland*, 486 U.S. 367 (1988), which held that jurors could not be confined to consideration of mitigating circumstances that the jury found unanimously. *Id.* at 375. In his motion and brief, White fails to specify which instruction violated *Mills* and how it was violated. This Court can find no such error. Because no mitigating circumstances were presented, the following modified version of MAI-CR3d 313.46 was given regarding the death penalty:

> You are not compelled to affix death as the punishment even if you have found existence of one or more aggravating circumstances. You must consider all the circumstances in deciding whether to assess and declare punishment of death. Whether that is to be your final decision rests with you.

This instruction clearly does not violate the mandate of *Mills*.

X.

White claims that the trial counsel was ineffective for "fail[ing] to object to all aspects of the State's penalty phase argument since at no time was the argument directed to those

aspects of this crime or this Movant which would justify a sentence of death[.]" This allegation fails to specify how the State's penalty phase argument violates the "wide latitude" allowed in such arguments. *State v. Shurn*, 866 S.W.2d 447, 463 (Mo. banc 1993), *cert. denied*, __ U.S.___ ,115 S.Ct. 118 (1994). White fails to plead facts demonstrating that counsel's objection would have been meritorious.

Y.

White alleges that his trial counsel was ineffective "[w]hen counsel failed to request the court to instruct the jury that the testimony of a drug addict should be taken with care and caution." White fails to identify which witnesses he claims to be drug addicts in this paragraph of his motion. Moreover, White fails to cite any authority establishing that, if a witness were shown to be a drug addict, White would be entitled to such an instruction. Ordinarily, judges are forbidden from making comments on the evidence. Thus, White's allegation, even if true, would not warrant relief.

Z.

White claims that his counsel was ineffective for failing to object to the imposition of the death penalty in that Missouri's death penalty statute places unconstitutional discretion in the prosecutor. This Court has already rejected this constitutional claim. *See State v. McMillian*, 783 S.W.2d 82, 101-02 (Mo. banc 1990), *cert. denied*, 498 U.S. 881 (1990). The motion court did not err in finding that had trial counsel objected, the trial court would have properly overruled the objection."

AA.

White alleges that counsel provided ineffective

assistance in failing to object to the State's opening statement wherein the prosecutor said that the evidence would show that White was involved in an ongoing and existing conspiracy.

The prosecutor's opening statement was not improper. White was charged with knowingly causing the death of Don Wright "by asphyxiating, cutting and stabbing him" and that such crime was committed by White "either acting alone or knowingly in concert with others . . ." One of the purposes of the opening statement is to inform the defendant of the contemplated course of the prosecution to enable him to fairly meet the charges. *State v. Murray*, 744 S.W.2d 762, 774 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988). References during opening statement to arguably admissible evidence made in good faith with a reasonable expectation that the evidence will be produced are not grounds for reversal. *State v. Harris*, 870 S.W.2d 798, 809 (Mo. banc 1994), *cert. denied*, __ U.S.___, 115 S.Ct. 371 (1994). Review of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's theory of the case. *See id.* Hence, this claim does not entitle White to any relief.

BB.

White alleges that counsel was ineffective in allowing the victim's mother and brother to remain in the courtroom, thereby allowing them to alter their expected favorable testimony. Neither witness was called to testify at trial. White does not state how the witnesses' expected testimony was changed. As the motion court correctly found, White fails to show how he was prejudiced by the presence of these witnesses

in the courtroom.

CC.

Subject to certain exceptions, a motion court must issue findings of fact and conclusions of law on all issues presented. *Barry v. State*, 850 S.W.2d 348, 349-50 (Mo. banc 1993); *Rule 29.15(i)* (1988). White claims that the motion court did not address three of his claims.

Contrary to White's contention, the motion court did in fact enter findings and conclusions on White's allegations relating to failure to interview State's witnesses and failure to object to the judge's statements regarding the governor's authority to pardon. These claims are addressed above.

White also alleges that counsel was ineffective when "counsel, without movants [sic] consent or knowledge, agreed to allow the trial court to instruct the jury that in a previous case. another defense attorney had in fact lied and misled a previous jury."

The motion court apparently did not address this one allegation of ineffective assistance of counsel. While *Barry* concludes that Rule 29.15 requires findings of fact and conclusions of law on every issue, it also acknowledges that not every failure to enter a finding of fact or a conclusion of law requires reversal and remand. 850 S.W.2d at 350. There are some common sense exceptions. For example, no finding of fact is necessary where the only issue is one of law. *Id.* In addition, an appellate court will not order a useless remand to direct the motion court to enter a proper conclusion of law on an isolated issue overlooked by the motion court where it is clear that the movant is entitled to no relief as a matter of law and will suffer no prejudice by being denied a remand. *See State v. Stallings*, 812 S.W2d 772, 779 (Mo. App. 1991). In

this particular case, White's claim is refuted by the record. The trial record reveals no oral or written instruction by the judge to the jury that in any earlier case, an attorney had lied to a jury. Thus, the pleadings and record conclusively show that relief was properly denied. Inasmuch as the motion court made extensive and specific findings and conclusions on every claim but one and the only claim upon which a necessary conclusion of !aw was omitted was a meritless allegation, reversal and remand are not warranted.

III.

In his appeal, White raises, for the first time, three claims not raised in his Rule 29.15 motions. All three fail.

A.

Judge Randall presided over White's first Rule 29.15 proceeding. In the first appeal, this Court remanded for a hearing to determine whether White had been abandoned by post-conviction counsel. Several days before the hearing, the judge had a conversation with the prosecuting attorney regarding the scope of the proceeding. White calls this conversation an improper ex parte communication, which gave rise to such an appearance of bias that the judge should have disqualified himself, sua sponte.

This argument is moot. The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.15 motion are still before this Court. This is true, but that judgment was rendered on August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge

to disqualify because of a conversation that is to occur more than one year in the future.

When the first motion judge made rulings relevant to the current appeal, no hint of bias existed. Therefore, he was under no duty to disqualify himself.

B.

Three weeks after the jury was discharged, the trial judge held a hearing in chambers, where a juror testified that he thought he might have gone to high school with a man who sat in the courtroom during the trial. Apparently, this man was a family member of one of the victims. The juror testified that he had not associated the man with either side of the case and had not spoken with or acknowledged him during the trial.

Although White did not raise this issue in his direct appeal or assert it in his Rule 29.15 motion, he now asks this Court to conduct a plain error review. Plain error review may be considered "on appeal." *Rule 84.13 (c)*. This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court "clearly erred" in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible.

The only possible basis for considering the claim is under a claim of ineffective assistance of appellate counsel in the original appeal for failing to raise an issue which amounted to plain error. For purposes of discussion, we will assume that the issue is raised as a motion to recall the mandate.

In his brief, White asserts that if he had been present at the hearing, he "could have contributed to the outcome of the

hearing, outlining for his attorneys the misconduct he had witnessed." However, the brief does not set forth that he actually observed any misconduct or that any misconduct actually occurred. White's absence from the hearing did not result in a manifest injustice or miscarriage of justice, and counsel's failure to raise such issue on appeal cannot be characterized as ineffective assistance of appellate counsel. This claim is denied.

C.

White finally contends that the time limits imposed by Rule 29.15 deprived him of his constitutional right to due process and resulted in arbitrary and capricious imposition of the death sentence, in violation of the constitutional prohibition against cruel and unusual punishment. White brings this claim for the first time on appeal, having failed to raise it in the motions for post-conviction relief as required by Rule 29.15 (d). This point is not reviewable. *See Twenter*, 818 S.W.2d at 641. Moreover, the time limits of Rule 29.15 are constitutional, even in death penalty cases. *See State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992), *cert. denied*, 507 U.S. 954 (1993).

IV.

White's Rule 29.15 pleadings are fatally inadequate because he fails to allege facts, not conclusions, that, if true, would entitle him to relief or because his claims are refuted by the record. The reason for this holding is clear. The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion. Rather, the purpose is to determine if the facts alleged in the motion are true. While the trial court erred in failing to enter a conclusion of law on one matter, remanding this case to supply the single missing legal conclusion would only serve to delay finality in this case and further burden the judicial system with a claim

that is meritless.

The judgment of the trial court is affirmed.

JOHN C. HOLSTEIN, Chief Justice

Benton, Price, Limbaugh, Robertson, and Covington, JJ., concur; White, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI

en banc

LEAMON WHITE,	)	FILED
	)	FEB 25, 1997
Appellant,	)	
	)	
vs.	)	No. 78459
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Opinion Concurring in Part and Dissenting in Part

Today the majority places important new burdens on those who seek an evidentiary hearing to prove their claims of ineffective assistance of counsel. While I differ with the majority's interpretation of the law on the specific points outlined below, my fundamental disagreement is with the majority's approach. The majority appears to see an evidentiary hearing as an unusual event, one that is justified only in the most compelling circumstances. I cannot find justification in our rules or precedents for this approach, and I disagree with the implicit policy choice that underlies it. I see little harm m giving a defendant, especially a death penalty defendant, one chance to present evidence that his counsel was ineffective.

Our rules encourage evidentiary hearings. An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief.[1] In the name of judicial economy and finality, the majority holds that the fact that a Rule 29.15 cannot be endlessly mended

[1]Rule 29.15(g) (1988).

means that it is a specially disfavored pleading. But nowhere does the role suggest that the motion is to be read more narrowly than any other pleading. In fact, the opposite is true. Except for the limited time in which they may be amended, post-conviction relief motions are to be treated exactly like all other civil filings.[2] If Rule 29.15 motions are to be judged by a different standard, the fact that they can only be amended in a limited way suggests to me that they should be read more, not less, broadly than other types of pleadings. I share the majority's interest in the finality, legitimacy, and efficiency of judicial proceedings. But these goals are ill-served by a pleading regime that elevates the form of pleadings over their substance. As this case shows, endless arguments about procedure are just as harmful to swift sure justice as substantive attacks.

When the substantive claims seem especially compelling, an approach based on form rather than substantive merit is especially troublesome. In this case, the entire defense was founded on a theory of misidentification. Allegations that trial counsel did not do all they could to pursue evidence of misidentification has great power to undermine confidence in the outcome of the trial. In Section II.E. of its opinion, the majority disposes of these claims on the barest technicality: the use of the words "failed to adduce testimony" in the pleadings. The majority does not hold that Mr. White has not identified his counsel's alleged error with sufficient particularity to allow a judge to try the question, which is the purpose of the pleadings. Rather, the focus is on phrasing. As the majority highlights, Mr. White's first mended motion was hurriedly and carelessly prepared. It is not the most polished pleading. The motion misplaces commas, misspells the names of parties and writes "eyewitness" as "eye witness." Yet the majority sees the motion as a sophisticated exercise in "clever gamesmanship." From the

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[2]Rule 29.15(a) (1988).

history of this case, it appears that Mr. White's appointed counsel was more concerned about meeting the short deadlines he was faced with when the original post-conviction counsel abandoned Mr. White than he was about using the "subtle wording" of his motion in an attempt to "sandbag the State."

The majority's comparison to a game is inapt. This is not a contest where prisoners are trying to trick the courts into giving them frivolous hearings and the courts attempt to come up with clever ways to ensure that few hearings are held. Mr. White did not seek to build his case upon the pleadings found deficient today; he offered a thorough and professional second amended motion. But because a judge mistakenly allowed that motion to be filed out of time, Mr. White was not allowed to present his strongest claims in their best light. Instead, he was forced to proceed on motions that the Court now finds were facially inadequate.

This narrow reading of the pleadings extends to the issue of prejudice. Credibility of the eyewitness testimony is at the heart of this case. But the majority is more concerned with pleading formality than whether there is evidence to support Mr. White's claim that eyewitnesses disagreed about who was present in the house. Even if the motion properly alleged that eyewitnesses would place another man at the scene, the majority holds, no sufficient allegation of prejudice would have been made because Mr. White does not also plead that he was not one of the other people present. If this allegation were true, I cannot see how Mr. White could not have been prejudiced. The witnesses the State built their entire case around would have been contradicted, by other eyewitnesses, about the identity of the assailants. The proper pleading of prejudice does not require one to foreclose every logically possible response to an allegation. The trying and weighing of the evidence are what the hearing is for. Mr. White has properly placed his counsel's performance on the issue of witness identification into

question. He should be given a hearing to see if he has any evidence to support his claim.

I would also remand to require findings and conclusions on all issues raised in the motion. This Court has properly limited appellate review of post-conviction relief motions to a determination of whether the factual findings and legal conclusions of the motion court are clearly erroneous.[3] Since the review is so limited, this Court has, in the past, required findings and conclusions on all issues mised in the motion.[4] But today, the majority abandons this rule and denies, sua sponte, a claim upon which the State admits no findings or conclusions were made. The majority justifies this by citing the "common sense exception" *Barry* described. That no findings of fact need to be entered when there are no factual disputes is axiomatic. Where, as here and in *Barry*, there has been no evidentiary hearing, the issues are exclusively legal ones. *Barry* reiterated the Court's long standing rule that, in a judgment on a motion for post-conviction relief, "'a mere recital or statement that the motion, files and records conclusively show that movant is entitled to no relief" is insufficient.[5] Had the motion court issued the bare conclusion that the motion, files, and records had showed that Mr. White was entitled to no relief on this issue, *Barry* would clearly be violated. I cannot see. how the total silence of the motion court can provide a better platform for meaningful appellate review than the conclusory rulings

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[3]Rule 29.15(j) (1988).

[4]Rule 29.15(i) (1988); *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993).

[5]*Barry*, 850 S.W.2d at 350 (quoting *Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978), which referred to the "nearly identical provisions" of the previous rule governing post-conviction relief, Rule 27.26).

Barry explicitly forbids.

In many cases, the motion court's rulings are worse than conclusory, they are clearly erroneous. Again, this is most clearly shown in relation to the motion court's ruling on the issue of possible testimony that another perpetrator committed the crime. On that issue, the motion court found:

> 4. Movant's claim in I(E) of his First Amended Motion that his counsel failed to adduce testimony from Ben Kinney that he and Don Wright sold drugs for two black men by the names of A.J. and Jose because they had threatened to kill Ben Kinney. Counsel is under no obligation to use impeachment material that he knows is improper. Allegations of crimes which have not resulted in criminal convictions are not proper impeachment. See State v. Stephens, 672 S.W.2d 714 (Mo. 1984); State v. Coats, 668 S.W.2d 119 (Mo. App. 1984). Also, this line of cross examination would also not be proper because it is not proper to cross examine so as to show other persons had motive for crime [sic] without evidence Connecting other person [sic] to crime [sic]. State v. Easley, 662 S.W.2d 248 (Mo. banc 1983); State v. Wynn, 666 S.W.2d 862 (Mo. App. 1984).
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> 5. As to movant's claim in I(F) in his First Amended Motion that his counsel should have adduced that his counsel should have adduced testimony from Deonat [sic] and Raymond Kinney that A.J. was the second perpetrator and not movant, is not a claim with merit because there is no showing of any affirmative evidence that A.J. was connected

with this crime as mandated in State v. Easley.

Apparently, the crucially deceptive effect of the phrase "failed to adduce" was quite lost on the motion court. The court also did not find that the alleged failure to discover contradictory eyewitness testimony resulted in no prejudice. Instead, the motion court denied a hearing on the clearly erroneous theory that eyewitness testimony placing a different man at the crime scene would not have been allowable because there was no evidence that that man was connected with the crime. The majority does not attempt to defend this circular argument and, instead, substitutes its own legal conclusions for those of the trial court. The rule in *Barry* is that meaningful appellate review of Rule 29.15 motions is crucially dependent on the entry of legal conclusions by the motion court, even when it has had no opportunity to determine factual issues. Where the legal conclusions of the trial court depart so substantially from the law, appellate review is similarly frustrated.

As Judge Thomas eloquently wrote for a unanimous Court the last time this case was before us: "[D]eath penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so they can reach a just and timely result, especially in death penalty cases."[6] This case has bounced back and forth between the trial court and this Court in order to answer entirely peripheral questions such as whether a fingerprint is sufficient to verify a petition and what the proper remedy is to correct a judge's mistaken grant of a filing extension. In that time, Lemon White has spent eight years on death row not getting what he deserves. Whether Mr. White deserves a new trial or a speedy execution depends upon a question that has remained completely unexplored: was Mr.

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[6]*State v. White*, 873 S.W.2d 590, 594 (Mo. Banc 1994).

White sentenced to die because he tortured and killed Don Wright or because his lawyers were more concerned about protecting themselves than their client? The only way we can get the certain answer we must have before we execute Mr. White is to give him a hearing.

I concur fully in Section III of the majority opinion. My reading of Mr. White's motion, however, convinces me that he adequately presents allegations that call into question the competence and zeal of his trial counsel. With respect, I must dissent from the denial of an evidentiary hearing.

RONNIE L. WHITE, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
v.	)	Case No. 97-
	)	1663-CV-W-3
	)	
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER GRANTING CERTIFICATE OF APPEALABILITY IN PART AND DENYING CERTIFICATE OF APPEALABILITY IN PART

On this date, the Court has denied Petitioner's Petition for Writ of Habeas Corpus. In order to appeal to the Court of Appeals, Petitioner must first obtain a Certificate of Appealability. 28 U.S.C. § 2253(c)(2) provides that a Certificate of Appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." "[A] substantial showing that a federal right has been denied . . . requires a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." Fleiger v. Delo, 16 F.3d 878, 882-83 (8th Cir.), cert. denied, 513 U.S. 946 (1994).[1] The granting of a Certificate of

[1]Fleiger was decided before § 2253(c)(3) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). However, Fleiger's standard remains viable. Roberts v. Bowersox, 137 F.3d 1067, 1068 (8th Cir. 1998),

Appealability is considered on an issue-by-issue basis. Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).

As the Order denying Petitioner's application demonstrates, the predominate issues in this case related to the existence of, and Petitioner's attempt to overcome, the procedural default of his claims in state court. The Court will (as specified below) deny a Certificate of Appealability with respect to the defaulted claims because there is no doubt that the claims were defaulted. Therefore, if the Court of Appeals reverses the rulings with respect to the procedural default, many of Petitioner's defaulted claims would have to be reconsidered on remand.

After conducting an independent review of the matter, the Court concludes that a Certificate of Appealability should be granted with respect to the following issues, which will be identified by their heading from of the Order denying the writ:

II.A Procedural Default: Actual Innocence
II.B Procedural Default: Adequacy of State Grounds
III. Petitioner's Entitlement to a Hearing
IV.F Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause
IV.L Trial Counsel's Conflict of Interest
IV.O Due Process: Pleading Requirements
IV.AA Actual Innocence
IV.DD Judicial Bias During Postconviction Proceedings, Part I
IV.FF Judicial Bias During Postconviction

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petition for cert. filed, No. 98-6386 (Oct. 2, 1998) ("the pre-Act certificate of probable cause and the post-Act certificate of appealability both issue on a substantial showing of the denial of a constitutional right," the only difference being their scope).

Proceedings, Part II

IV.TT Conflict of Interest, Etc.

The Court concludes a Certificate of Appealability should be denied as to the remaining issues. When a Certificate of Appealability is denied, the court is required to "state the reasons why such a certificate should riot issue." Fed. R. App. P. 22(b); see also Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). The rationale for the Court's ruling is as follows:

II.B Procedural Default: Ineffective Assistance of Postconviction Counsel, Part I - The Supreme Court and the Eighth Circuit have repeatedly held there is no right to effective assistance of postconviction counsel.

II.C Procedural Default: Abandonment of Postconviction Counsel - The Supreme Court and the Eighth Circuit have repeatedly held the Sixth Amendment does not apply in a postconviction proceeding.

IV.A Ineffective Assistance of Trial Counsel: Voir Dire, Part I - The claim has been procedurally defaulted.

IV.B Informing Jurors About the Governor's Power to Pardon - The claim was implicitly rejected by the Supreme Court in Ramos and explicitly rejected by the Eighth Circuit in Bannister.

IV.C Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection - This claim was procedurally defaulted. In addition, the objection had no merit, so Petitioner could not have suffered prejudice.

IV. D Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror - This claim was procedurally defaulted.

IV.E Right to Fair and Impartial Jury - This claim was procedurally defaulted.

IV. G Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror - This claim was procedurally defaulted. In addition, the record conclusively contradicts the factual basis for Petitioner's claim.

IV.H Ineffective Assistance of Trial Counsel: Voir Dire, Part II - This claim was procedurally defaulted.

IV. I Ineffective Assistance of Trial Counsel: Failure to Investigate and Introduce Evidence of Innocence - This claim was procedurally defaulted.

IV.J Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence - This claim was procedurally defaulted.

IV.K Eighth Amendment Violation: Lack of Mitigating Evidence - This claim was procedurally defaulted. In addition, relief would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.M Ineffectiveness of Appellate Counsel: Myriad of Claims - These claims all related to the failure to appeal specified claims of ineffective assistance of appellate counsel, which is not cognizable.

IV.N Due Process Violation: Abandonment by Postconviction Counsel - Case law firmly establishes that there is no right to counsel in a postconviction proceeding. Petitioner's attempt to base his claim on the Fourteenth Amendment instead of the Sixth Amendment would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.P Due Process: Rule 29.15's Deadlines - The Eighth Circuit has already rejected this argument several times.

IV.Q Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams - This claim was procedurally defaulted. In addition, Williams' affidavit demonstrates that trial counsel did interview her.

IV.R Ineffective Assistance of Trial Counsel: Failure to Give an Opening Statement at the Beginning of Trial - This claim was procedurally defaulted. In addition, the decision to deliver an opening statement at the beginning of the defendant's case instead of the beginning of trial is a classic strategic decision that cannot be second-guessed.

IV.S Ineffective Assistance of Trial Counsel: Failure to Hire an Expert - This claim was procedurally defaulted.

IV.T Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because Missouri has a "nonweighing" capital sentencing scheme.

IV.U Ineffective Assistance of Trial Counsel: Failure to Object to Videotaped Lineup - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because the claim had no merit.

IV.V Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson - This claim was procedurally defaulted.

IV.W Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause - This claim was procedurally defaulted. In addition, Petitioner's attempt to apply Batson v. Kentucky to the prosecutor's use of

peremptories to eliminate prospective jurors with marginal doubts about the death penalty is really a new rule that would be barred by Teague v. Lane.

IV.X Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument During Penalty Phase - This claim was procedurally defaulted.

IV.Y Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver - Trial counsel did not make a constitutional objection, and Appellate Counsel's decision not to appeal for plain error is hard to second-guess. In addition, the evidence does not constitute a comment on Petitioner's decision not to testify at trial.

IV.Z Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's InCourt Identification of Petitioner - This claim would have been reviewed only for plain error. In addition, the factual basis for Petitioner's claim is not supported by the record.

IV.BB Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer - This claim was procedurally defaulted.

IV.CC Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel - This claim was procedurally defaulted.

IV.EE Judicial Bias During Trial - This claim was procedurally defaulted.

IV.GG Ineffective Assistance of Trial Counsel: "Bad Loser" Comment - This claim was procedurally defaulted. In addition, as discussed in detail in the Order denying relief, the record demonstrates that Petitioner suffered no prejudice as a result of this comment.

IV.HH Ineffective Assistance of Postconviction

Counsel, Part II - This claim is not cognizable.

IV.II Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims - This claim actually consists of other claims raised independently elsewhere in the Petition. It is not an independent claim, and the issues it raises are discussed elsewhere.

IV.SS Ineffective Assistance of Trial Counsel: Myriad of Claims - These claims were procedurally defaulted and, in any event, have no merit.

IV.UU Restriction on Cross Examination of Kinney - This claim involves issues of s law and is not cognizable in a habeas proceeding.

IV.VV Cumulative Error of Trial Counsel - The Eighth Circuit has repeatedly held this claim is not cognizable.

IV.WW Cumulative Error (Generally) - The Eighth Circuit has repeatedly held this claim is not cognizable.

IT IS SO ORDERED.

ORTRIE O. SMITH, JUDGE

DATE 12/4/98 UNITED STATES DISTRICT COURT